Supreme Court, U.S.
FILED

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No. _____

IN THE
Supreme Court of the United States
October Term, 1993

Re: L.F. JENNINGS OIL COMPANY,
Debtor,

NEW MEXICO ENVIRONMENT DEPARTMENT,
Petitioner,

v.

ORALIA FRANCO, Successor Trustee for
the Estate of L.F. Jennings Oil Company,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petition for Writ of Certiorari

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14 pp

QUESTIONS PRESENTED

1. Whether under 11 U.S.C. § 554(a) the bankruptcy court can approve the trustee's motions to abandon three estate properties after the trustee discovers and reports to the state that the properties are contaminated but before the trustee properly investigates and remediates the contamination contrary to the state's laws designed to protect public health and safety and contrary to 28 U.S.C. § 959(b).

2. Whether the state's successful efforts to eliminate, investigate and remediate contamination at two of the abandoned properties after losing in the bankruptcy court and pending appeal, without seeking a stay of the bankruptcy court's abandonment order, moots the state's claim for definitive guidance on this Court's expression in *Midlantic National Bank v. New Jersey Department of Environmental Protection,* 474 U.S. 755 (1986).

PARTIES IN THE COURT OF APPEALS

John E. Foulston, United States Trustee, 401 N. Market Street, Room 180, Wichita, Kansas 67202 and Oralia Franco, Successor Trustee for the debtor L. F. Jennings Oil Company, Post Office Box 15038, Las Cruces, New Mexico 88004 appeared as the parties in opposition to the New Mexico Environment Department in the Court of Appeals.

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The New Mexico Environment Department respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit for the final order entered on November 3, 1993.

OPINIONS BELOW

On May 18, 1992 the United States Bankruptcy Court for the District of New Mexico issued an unpublished order (App., pp. 19-20) which denied the New Mexico Environment Department's motion to reconsider and quash two abandonment orders issued June 12, 1991 (App., pp. 21-22) and July 12, 1991 (App., pp. 23-24). The United States District Court for the District of New Mexico affirmed the Bankruptcy Court by unpublished memorandum opinion and order issued November 30, 1992 (App., pp. 13-18). The United States Court of Appeals for the Tenth Circuit issued two published orders on September 3, 1993 (App., pp. 6-12) reported at 4 F.3d 887 (10th Cir. 1993) and November 3, 1993 (App., pp. 2-3) reported at 4F.3d (10th Cir. 1993).

JURISDICTION

The first order of the United States Court of Appeals for the Tenth Circuit was entered on September 3, 1993. (App., pp. 6-12.) On motion for clarification of opinion filed by the bankruptcy trustee and response by the New Mexico Environment Department, the Court of Appeals recalled the mandate on its first order by order filed November 3, 1993. (App., pp. 4-5.) The amended order of the Court of Appeals was entered on November 3, 1993. (App., pp. 2-3.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

11 U.S.C. § 554(a) provides:

> After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

28 U.S.C. § 959(b) provides:

> Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

N.M. Stat. Ann. § 74-4-4(C) (Michie 1993) provides:

> The [environmental improvement] board shall adopt regulations concerning underground storage tanks as may be necessary to protect public health and the environment that are equivalent to and no more stringent than federal regulations adopted by the federal environmental protection agency pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended, and that shall include:
>
> (1) standards for the installation, operation and maintenance of underground storage tanks;
>
> (2) requirements for financial responsibility;
>
> (3) standards for inventory control;
>
> (4) standards for the detection of leaks from and the integrity testing and monitoring of underground storage tanks;
>
> (5) standards for the closure and dismantling of underground storage tanks;
>
> (6) requirements for record-keeping; and
>
> (7) requirements for the reporting, containment and remediation of all leaks from any underground storage tanks.

The applicable New Mexico Environmental Improvement Board regulations governing corrective action for petroleum underground storage tank systems, EIB/USTR §§ 1200, 1202, 1203, 1204, 1205, 1206, 1208 and 1209, and Appendix A, the corrective action timeline, are set forth at App., p. 42 and following.

STATEMENT OF THE CASE

Important Facts

The New Mexico Environment Department is an executive branch agency of New Mexico state government and is charged, inter alia, with administering a program for identifying and assuring corrective action at leaking underground storage tank contamination sites in the state.[1]

On December 20, 1990, L.F. Jennings Oil Company filed a voluntary Chapter 7 petition in the bankruptcy court. Harley H. Swink was appointed trustee and served until his resignation in March, 1992. John E. Foulston and Oralia Franco are successors to Swink.

The bankruptcy estate included three gasoline stations with underground storage tanks located in Capitan, Carrizozo and Ruidoso, Lincoln County, New Mexico. In connection with selling the stations Swink hired consultants beginning in February, 1991, to perform tank tightness tests and soil sampling to establish whether these three stations were contaminated. Soils at all stations and the tanks at Capitan and Carrizozo were tested by early April, 1991. Most of the fuel was removed from the tanks and sold.

The tank and line tests showed the underground storage tank systems were probably tight. The soil tests showed that actionable levels of leaked petroleum hydrocarbons were present at all three stations.

The New Mexico underground storage tank regulations required Swink to notify the state and to follow through with corrective action by completing a sight assessment and upgrading or removing or closing the tanks. Swink reported on March 28, 1991, for Carrizozo and Ruidoso, and on April 19, 1991, for Capitan. Swink moved to abandon the three stations on April 10, 1991, without service or notice to the environment department

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[1] N.M. Stat. Ann. §§ 9-7A-1, *et seq.*, §§ 74-4-1, *et seq.*, and §§ 74-6B-1, *et seq.* (Michie 1993).

and without indicating the stations were contaminated in his motion to abandon. The bankruptcy court granted Swink's motion by an order entered June 12, 1991, for the Ruidoso station (App., pp. 21-22), and by a second order entered July 12, 1991, covering the Capitan and Carrizozo stations. (App., pp. 23-24.)

After Swink refused to follow through with corrective action on grounds that the stations were abandoned from the estate, the environment department moved in the bankruptcy court for an order to reconsider and quash abandonment on August 16, 1991. The motion was denied after an evidentiary hearing on April 27, 1992.

With concurrence from the environment department the stations at Carrizozo and Ruidoso were deeded by their abandonees on May 19, 1992, to purchasers who agreed to remove the underground storage tanks before taking title.[2]

Jurisdiction Below

The bankruptcy court's jurisdiction in the case is provided at 11 U.S.C. § 301 and 28 U.S.C. §§ 151 and 1334. The district court's jurisdiction is provided at 28 U.S.C. § 158(a). The court of appeals' jurisdiction is provided at 28 U.S.C. § 158(d).

ARGUMENT

This case crystallizes the growing dilemma in environmental bankruptcy practice of what standards should apply where contaminated estate property is sought to be abandoned by a bankruptcy trustee or debtor in possession.

The court of appeals dismissed on the Carrizozo and Ruidoso stations for mootness. On the Capitan station, the court of appeals affirmed the bankruptcy court on the merits, finding that the station could be abandoned since it presented no imminent and identifiable harm to the public health because it was not listed on the state's list of contaminated sites, because there were insufficient data to prove an imminent threat and because the only violation involved the filing of a report. (App., p. 11.) The court of

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[2] The events of May and June 1992 were not presented at the hearing in the bankruptcy court. However, they were raised by the environment department in the district court and were found not have rendered the appeal moot. (App., pp. 15-16.)

appeals' opinion misconstrues the record and the issues. Capitan was not on the state's list because so little was known about it. There were no data to prove an imminent threat because the trustee declined to follow the regulations and investigate the site. The violation was not just for failure to file a report. The missing report should have contained results from the trustee's required investigation.

The last and most comprehensive statement of the Supreme Court on a bankruptcy trustee's abandonment power appeared in 1986.[3] Increasingly, bankruptcy courts have drawn opposing conclusions based on the broad, textual holding of the majority that,

> ... a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.

474 U.S. 507, *versus* the seemingly limiting language of its footnote.[4] Is it enough that public health laws are violated or must the violation be shown to lead directly to human injury or death? As a consequence of the narrower construction trustees are encouraged to drop contaminated properties by § 554 abandonment at the earliest stages and before the due date for lawful requirements that the contamination be characterized. The effect of this practice makes for impasse in developing facts about the contamination. By its opinion below the Tenth Circuit now has drawn the line far on the side of the limiting language in the *Midlantic* footnote 9.

The New Mexico environment department submits that the bankruptcy court's gamble on an absence of information conflicts with the *Midlantic* court's concern for a pragmatic balance between bankruptcy policies and environmental policies. The court of appeals' affirmance of the bankruptcy court on the Capitan station and dismissal of the department's appeal on the Carrizozo and Ruidoso stations, as moot, should be reversed. This

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[3] *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986).

[4] *Viz.*, "This exception to the abandonment power vested in the trustee by § 554 is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm." 474 U.S. 507, ftn. 9.

Court should clarify its *Midlantic* analysis to provide that the existence of laws and regulations governing environmental contamination is enough to trigger compliance with them under 28 U.S.C. § 959 so that investigations will proceed in bankruptcy and an informed decision about what to do can be made.

Question 1

In the bankruptcy court the environment department's witness testified that the bankruptcy trustee was apparently in compliance with the underground storage tank regulations on the date the abandonment request was filed. On the date the abandonment order for Ruidoso issued, however, the trustee was due to have completed an on-site investigation under EIB/USTR-12, § 1206 and had failed to do so. The Capitan and Carrizozo stations were in violation for the same reason on July 12, 1991 when the bankruptcy court approved those abandonments. (App., p. 32.)[5]

The state regulations are police power requirements designed to confer optimum health, safety, comfort and economic and social well being on the state's inhabitants. N.M. Stat. Ann. § 74-1-2 (Michie 1993). Protection of the state's healthful environment is fundamental under the New Mexico Constitution. N.M. Const. Art. XX, Sec. 21.

The Court of Appeals found that absence of the Capitan station from the state's list of sight priorities shows that the site was not an immediate threat to public health or safety. (App., p. 11.) The state's expert witness in the bankruptcy court testified to the contrary that benzene constituents in the gasoline at the three stations are carcinogenic and can explode when mixed with oxygen inside the USTs or in sewer lines and man holes into which they can migrate. (App., pp. 32-33.) He said that based upon the meager information available, the station at Ruidoso constituted the most serious risk to public health because gasoline had contaminated groundwater there.[6]

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[5] In it's oral findings the bankruptcy court distinguished the trustees' failure to report from the Supreme Court's concerns in *Midlantic*. (App., p. 26.) The distinction between the required reports and the investigative work which must be done in order to make them only emphasizes the wrongheadedness of a rule that permits abandonment of contaminated property without regard to requirements for characterization of the contamination.

[6] This fact should have been discovered by the trustee in his required investigation of the site. The trustee did not learn of the ground water contamination at Ruidoso before the abandonment order because he did not do the EIB/USTR-12, § 1206 investigation.

(App., p. 32.) He said that all three stations constitute serious environmental health and safety threats. (App., pp. 32-34.)[7]

Under 28 U.S.C. § 959(b), contaminated estate property must be managed according to the requirements of valid state laws in the same manner as the owner would be bound to do.[8] The bankruptcy court's preoccupation with the imminence of threat and the court of appeals' concurrence in it, miss the broader teaching of *Midlantic* that a set of laws designed to protect against threats to public health should be obeyed before abandonment is allowed.

Courts that have drawn the line for broader environmental protection are compiled in the recent case of *Alabama Surface Mining Commission v. N.P. Mining Company, Inc.*, 963 F.2d 1449 (11th Cir. 1992). There, the question was whether post-petition mine reclamation penalties should have administrative expense priority under 11 U.S.C. § 503(b). The Eleventh Circuit reasoned that they should, because punitive assessments are ordinary incidents of the trustee's preservation of the estate. Albeit § 503(b) does not involve the abandonment power, *N.P. Mining Company, Inc.*, shows the wisdom of a broad interpretation of trustee obligations when they come up against local enactments designed to protect the environment and public health. Such is the approach that trustees should be required to take when dealing with abandonment of contaminated estate properties.

Question 2

While the environment department's appeal from the bankruptcy court to the district court was pending, Foulston moved to dismiss the appeal as moot with respect to the Carrizozo and Ruidoso stations on grounds that (1) the department had acknowledged that the sites did not pose a serious threat

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[7] Ground water contamination at the Ruidoso station was not found until NMED investigated the site in anticipation of the April 27, 1992 evidentiary hearing in the bankruptcy court.

[8] In his oral ruling the bankruptcy judge said that if the department had filed a timely objection rather than a motion for reconsideration, he might have ordered removal of the remaining gasoline in the tanks; but that he would have approved the abandonment. (App., p. 26.) The bankruptcy court's hypothetical remedy is less than the state regulations require and is presumptively contrary to the holding in *Midlantic* that "[n]either the Court nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety." 474 U.S. at 502.

to public health, and (2) each of the properties was sold to good faith purchasers. The motion was denied in the district court's final order. (App., p. 16.) The district court found that the environment department still wanted the trustee to retake possession at the Capitan station and that the department's request for a declaration that all three abandonments were error, made the controversy real. (App., p. 16.) The court of appeals held that the department's claim *was* moot because the Capitan station was not an imminent threat and because the claim for a declaration of error against the Carrizozo and Ruidoso stations was merely a request for an advisory opinion. (App., p. 10.)

The doctrine of mootness requires that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. *Steffel v. Thompson*, 415 U.S. 452, 459, ftn. 10 (1974). As the district court below noted in its memorandum opinion, "[i]f events transpire during the pendency of the [bankruptcy] appeal which prevent the appellate court from granting effective relief, the appeal will be dismissed as moot." *In the Matter of T & H Diner, Inc.*, 108 B.R. 448, 452 (D.N.J. 1989). Where, however, events moot some issues and not others, there is still jurisdiction to consider the remaining issues. *Federal Deposit Insurance Corp. v. Jennings*, 816 F.2d 1488, 1491 (10th Cir. 1987).

Moreover, an appeal is not rendered moot if the reviewing court is able to grant effective relief, and particularly if the underlying dispute between the parties is one "capable of repetition, yet evading review." *In re Commerce Oil Co.*, 847 F.2d 291 (6th Cir. 1988). Here, the line drawn by the court of appeals in the *L.F. Jennings Oil Company* bankruptcy hinders responsible management of contaminated estate property and confounds the state's required investigation.

Because of the environment department's unusual procedural entry into the *L.F. Jennings Oil Company* bankruptcy case, there is no underlying complaint for declaratory judgment brought under 28 U.S.C. § 2201. Nonetheless, declaratory relief is the essence of what the department sought below and seeks here. Bankruptcy courts and federal courts on appeal are rife with irreconcilable digressions concerning a trustee's power to abandon environmentally contaminated estate property. The environment department submits that this Court's updated declaration is needed and that this case is not moot. See *Super Tire Engineering Company v. McCorkle*, 416 U.S. 115, 122 (1974).

As to the matter of a stay, the department did not seek a stay under Bankruptcy Rule 8005 because, as a public policy matter, the tank removal and soil remediation connected with it at Carrizozo and Ruidoso and the continuing investigation of ground water contamination at Ruidoso were in the best interest of all concerned, including the subsequent purchasers, the estate, its creditors and the public health. To have sought a stay would have been irresponsible, given the trustee's previous declaration that the estate could not and would not expend any funds for these activities, based upon the demands of the FDIC. (App., pp. 38-39.)

The environment department's requested construction of *Midlantic* is not impermissible activism,[9] as argued by the trustee below. Nor is the interpretation given by the bankruptcy court the only one possible. The better rule for environmental pollution cases in bankruptcy is that the entity in the best position to prevent and discover contamination should be responsible for investigating and cleaning it up. Any other rule provides a loophole and encourages abandonment of contaminated property without timely remediation.

CONCLUSION

This Court should declare as its rule that trustees must take immediate steps to investigate, contain and remediate environmental contamination at estate properties. Abandonment of such properties should not be permitted until compliance with applicable environmental laws and regulations for the protection of public health is demonstrated. The Court's reorientation of bankruptcy trustees away from the path of abandoning contaminated property before it is characterized is overdue.

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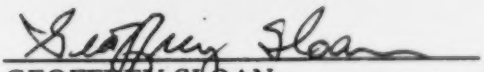
[9] That is, an interpretation which reads *Midlantic* to mean that compliance with state police power laws in the interest of public health must obtain prior to abandonment. Compare *In re FCX, Inc.*, 96 B.R. 49 (E.D.N.C. 1989) and the cases cited in footnote 11 at 96 B.R. 54.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL

By: 

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Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1993

Re: L.F. JENNINGS OIL COMPANY,
Debtor,

NEW MEXICO ENVIRONMENT DEPARTMENT,
Petitioner,

v.

ORALIA FRANCO, Successor Trustee for
the Estate of L.F. Jennings Oil Company,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Appendix to
Petition for Writ of Certiorari

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: L.F. JENNINGS OIL COMPANY,	)	
	)	
Debtor,	)	
	)	
	)	
	)	
NEW MEXICO ENVIRONMENT DEPARTMENT,	)	
	)	
Appellant,	)	
	)	
v.	)	93-2001
	)	
JOHN F. FOULSTON, Successor Trustee for the Estate of L.F. Jennings Oil Company, Debtor,	)	
	)	
Appellee.	)	

ORDER

Filed November 3, 1993

Before LOGAN, BRORBY, Circuit Judges, and BRIMMER*, District Judge.

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*Honorable Clarence A. Brimmer, United States District Judge for the District of Wyoming, sitting by designation.

Appellee, Oralia Franco, successor trustee to John E. Foulston, previous trustee for the Estate of L.F. Jennings Oil Company, debtor, has filed a Motion for Clarification of Opinion concerning the effect of this court's remand of the captioned action pursuant to United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950). The appeal challenged the abandonment of three properties pursuant to 11 U.S.C. § 554(a). This court's opinion affirmed the appeal as to one property, and dismissed the appeal as to the remaining two properties on mootness grounds. We remanded to the district court, with the further order to remand to the bankruptcy court to vacate its abandonment orders and its denial of reconsideration as to the two properties. Appellee contends that the effect of the bankruptcy court's vacating its orders and denial of reconsideration may be to bring the two properties back into the bankruptcy estate, citing 11 U.S.C. § 554(d).

Appellant has responded, and disagrees with appellee's concern, citing 11 U.S.C. § 363(m). Appellant also argues generally for the application of Munsingwear to "safeguard[] the future interests of litigants against the res judicata effect of the lower court decision." Finally, appellant notes its indifference to the remand instructions, based on its stated intent not to relitigate the abandonment orders.

Under the facts of this case, where the two properties have been sold to third parties, we recognize the problem created by the wording of our opinion's remand under Munsingwear. By our order, we did not intend to require the two abandoned properties that were sold to bona fide purchasers to be returned to the bankruptcy estate. We also believe that the precedential value of the bankruptcy and district courts' rulings on the properties have been minimized by our opinion on appeal. Therefore, we grant appellee's motion and amend the final paragraph of this court's opinion in the captioned case, dated September 8, 1993, to read as follows:

The judgment of the United States District Court for the District of New Mexico is AFFIRMED as to the Capitan site. As to the Carrizozo and Midtown sites, this appeal is DISMISSED as moot.

Entered for the Court

S/_____
ROBERT L. HOECKER, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: L.F. JENNINGS OIL COMPANY,	)	
	)	
Debtor,	)	
	)	
	)	
	)	
NEW MEXICO ENVIRONMENT DEPARTMENT,	)	
	)	
Appellant,	)	
	)	
v.	)	93-2001
	)	
JOHN F. FOULSTON, Successor Trustee for the Estate of L.F. Jennings Oil Company, Debtor,	)	
	)	
Appellee.	)	

ORDER

Filed November 3, 1993

Before LOGAN, BRORBY, Circuit Judges, and BRIMMER*, District Judge.

*Honorable Clarence A. Brimmer, United States District Judge for the District of Wyoming, sitting by designation.

The Court on its own motion orders that the mandate issued September 30, 1993 in the captioned case is recalled.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: S/_____

Patrick Fisher
Chief Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

In re: L.F. JENNINGS OIL COMPANY,

Debtor,

NEW MEXICO ENVIRONMENT DEPARTMENT,

Appellant,

v.

JOHN F. FOULSTON, Successor Trustee for the Estate of L.F. Jennings Oil Company, Debtor,

Appellee.

No. 93-2001

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CIV - 92 - 533 - LH)

Filed
United States Court of Appeals
Tenth Circuit
Sep 08 1993
Robert L. Hoecker
Clerk

Submitted on the briefs:

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James R. Jurgens of Jurgens, Tallmadge & With, P.A., Santa Fe, New Mexico, for Appellee.

Before LOGAN and BRORBY, Circuit Judges, and BRIMMER, ** District Judge.

**Honorable Clarence A. Brimmer, United States District Judge for the District of Wyoming, sitting by designation.

LOGAN, Circuit Judge.

At the heart of this appeal[1] are three properties, former gas stations that once belonged to the debtor, L.F. Jennings Oil Company. They are known as the Carrizozo Mart (Carrizozo), the Midtown Mart 1 (Midtown), and the Capitan Mart (Capitan). After Jennings filed for Chapter 7 bankruptcy protection, the trustee sought to sell the properties. In the process, he obtained tank and soil tests on all three sites, which evidenced contamination in excess of 100 parts per million at each site. The trustee reported these results to the New Mexico Environment Department (NMED), as required by state law.

The trustee subsequently concluded that the bankruptcy estate had no equity in the properties; accordingly, he filed motions to abandon them pursuant to 11 U.S.C. § 554(a). Although the NMED had notice of the sites'

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[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

contamination and of Jennings' bankruptcy, it did not enter an appearance in the bankruptcy proceeding, and therefore did not receive notice of the abandonment motions.

The bankruptcy court allowed abandonment of the properties, and the NMED subsequently filed a motion for reconsideration requesting that the bankruptcy court quash its previous abandonment orders. After a hearing the bankruptcy court denied the NMED's motion.[2] In its oral ruling, the court stated that the NMED should have entered an appearance and objected to the abandonment motions in a timely fashion, and concluded that none of the properties represented an immediate threat to public health or safety such that the abandonment was improper.

The NMED appealed this decision to the district court, but did not seek a stay. The successor trustee moved to dismiss the appeal as moot as to two of the properties, Carrizozo and Midtown, which by that time had been deeded to third-party purchasers. On November 30, 1992, the district court filed a memorandum opinion and order, denying the trustee's motion to dismiss, and affirming the bankruptcy court's decision denying reconsideration of its order allowing abandonment.

The NMED now appeals, contending that the trustee's abandonment of the properties contravened the state's environmental laws and violated the *Supreme Court's ruling in Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986). We have jurisdiction over this appeal pursuant to 28 U.S.C. § 158(d). We agree with the district court that the facts of this case are not contested. We review the bankruptcy court's legal determinations de novo. *Clark v. Valley Fed. Sav. & Loan Ass'n (In re Reliance Equities, Inc.)*, 966 F.2d 1338, 1340 (10th Cir. 1992).

Initially, we address the trustee's contention that this appeal is moot as to Carrizozo and Midtown. "'The mootness question necessarily constitutes our threshold inquiry, because the existence of a live case or contro-

[2] The NMED's motion for reconsideration expressly discusses only two of the three properties, as does the trustee's response to that motion. However, at the hearing the bankruptcy court heard evidence regarding all three properties, the parties' proposed factual findings and conclusions of law discuss all three properties, and the bankruptcy court's ruling refers to all three properties. On appeal to the district court and to this court, the parties continue to discuss all three properties. Therefore, we do likewise.

versy is a constitutional prerequisite to the jurisdiction of the federal courts.'" *Dais-Naid, Inc. v. Phoenix Resource Cos. (In re Texas Int'l Corp.)*, 974 F.2d 1246, 1247 (10th Cir. 1992) (quoting *Beattie v. United States*, 949 F.2d 1092, 1093 (10th Cir. 1991)). We review the mootness issue de novo. Midlantic Our review of the district court's order, together with the undisputed facts concerning events subsequent to the bankruptcy court's abandonment orders, convinces us that this appeal is moot with respect to Carrizozo and Midtown.

The record reveals that the tanks were removed from the Carrizozo and Midtown sites, that the NMED issued letters with respect to these properties, essentially recognizing that they do not pose a serious threat to public health and safety, and that the properties were sold to third-party good faith purchasers. Under these facts, none of which the NMED contests, it is clear that no live controversy with respect to the Carrizozo and Midtown sites still exists, nor did it exist when the district court decided the case. See *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (case or controversy required at all stages of federal review); *Morgan v. K.C. Mach. & Tool Co.* (In re K.C. Mach. & Tool Co.), 816 F.2d 238, 242 (6th Cir. 1987) (dispute as to abandoned property moot). Nonetheless, the NMED asserts two points in favor of its position that this appeal is not moot regarding these two properties. First, it contends that "the conflict remains squarely drawn," and argues that this court can still grant effective relief as to Carrizozo and Midtown. Second, it contends that this dispute falls within the "capable of repetition yet evading review" exception to the mootness doctrine.

The NMED's first argument is not persuasive. It characterizes the conflict as "whether the Bankruptcy Court can approve abandonment of contaminated estate property without first requiring the trustee to comply with state environmental laws and regulations designed to protect public health and safety." Appellant's Br. at 18. The evidence indicates the Carrizozo and Midtown sites have been cleaned up to the NMED's satisfaction. The determination whether the bankruptcy court abandoned these properties in error, therefore, would have no practical significance. See *Smith v. United States (In re Smith)*, 921 F.2d 136, 139 (8th Cir. 1990); *Martin-Trigona v. Shiff*, 702 F.2d 380, 386 (2d Cir. 1983) ("The hallmark of a moot case or controversy is that the relief sought can no longer be given or *is no longer needed.*") (emphasis added).

Additionally, it is clear from the record and the NMED's own arguments that effective relief cannot be granted on this issue as to Carrizozo and Midtown. The NMED's motion for reconsideration requested that the bankruptcy court quash its abandonment orders, and order the trustee to investigate the tank sites and perform any necessary cleanup. Now, despite the undisputed lack of any threat from these properties, the NMED maintains that effective relief an still be had: "the Court should . . . hold, *without requiring further action*, that the abandonment of [Carrizozo and Midtown] before environmental laws were satisfied was error." Appellant's Br. at 19. Such an order would grant no effective relief. See *Lewis*, 494 U.S. at 479-80 (declining review due to mootness where appellee's only remaining request was to have statute declared unconstitutional). Accordingly, it appears to this court that, at best, the NMED is seeking an advisory opinion on this issue as to Carrizozo and Midtown. See *Sullivan Cent. Plaza, I, Ltd. v. BancBoston Real Estate Capitol Corp. (In re Sullivan Cent. Plaza, I, Ltd.)*, 914 F.2d 731, 735 (5th Cir. 1990) ("The mootness doctrine avoids advisory opinions on abstract propositions of law."), *aff'd on reh'g on other grounds*, 935 F.2d 723 (1991). This conclusion is bolstered by the NMED's various arguments on appeal seeking future guidance from this court on what it views as an important issue.

We also disagree with the NMED's contention that this issue is "capable of repetition yet evading review." While, generally speaking, the circumstances are likely to repeat themselves insofar as a trustee in bankruptcy may seek to abandon properties that require environmental cleanup pursuant to state regulation, the issue does not inherently escape review. Outside of a vague reference to the short time deadlines in bankruptcy proceedings, the NMED doe not argue otherwise. See *Beattie*, 949 F.2d at 1094 n.2 (issue must, by its own nature, be "so ephemeral as to elude the processes of federal review"). We expect that the NMED will have ample opportunity to contest this issue in each case where it arises, should it properly enter an appearance and file a request for notice pursuant to the bankruptcy rules. The NMED cannot rely on its own failure to follow such rules to support its argument that the exception applies.

Additionally, the NMED could have requested a stay if it thought the properties represented an immediate threat to public health and safety. See *Official Comm. of Unsecured Creditors of LTV Aerospace & Defense Co., v. Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F.2d 322, 325-26 (2d Cir. 1993) (mootness in light

of failure to seek stay "especially pertinent in bankruptcy proceedings"); *In re Sullivan Cent. Plaza, I, Ltd.*, 914 F.2d at 733 (failure to obtain a stay will result in court's inability to grant effective relief once property sold); *Cook v. Fletcher* (In re Cook), 730 F.2d 1324, 1326 (9th Cir. 1984) (failure to seek stay supported court's conclusion that appeal was moot). The NMED's arguments that it did not seek a stay in light of the purchasers' agreements to perform cleanup activities at Carrizozo and Midtown merely beg the question. We conclude that this appeal is moot as to Carrizozo and Midtown.

We reach the merits of the NMED's argument that the bankruptcy court allowed abandonment in violation of the Supreme Court's opinion in *Midlantic*, but only as to the remaining property, the Capitan site.[3] *Midlantic* holds that "[n]either the Court nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety." 474 U.S. at 502. However, this exception to the trustee's abandonment powers under bankruptcy law "is a narrow one." Midlantic at 507 n.9. As the parties' arguments on appeal apparently recognize, before abandonment of a property can violate *Midlantic* the property must represent an immediate and identifiable harm to public health or safety. See Midlantic; Borden, Inc. v. Wells-Fargo Business Credit (In re Smith-Douglass, Inc.), 856 F.2d 12, 16 (4th Cir. 1988).

It is abundantly clear from the record on appeal that Capitan was not, at the time of abandonment, an immediate threat to public health or safety. The record shows that 1) the Capitan site was not listed on the state's list of

---

[3] We decline to address the parties' arguments regarding the NMED's failure to object to the proposed abandonment before the bankruptcy court order. The parties characterize the bankruptcy court's order as a ruling that the NMED was barred from objecting to the abandonment after the bankruptcy court's decision or that the NMED waived its right to challenge the abandonment by failing to object before the bankruptcy court's decision. Neither characterization appears to be correct. The bankruptcy court's order does not state the basis for its decision denying the NMED's motion for reconsideration. The transcript of the court's oral ruling, however, clearly states that the court had two reasons for denying the motion: the NMED should have entered an appearance, filing a request for notice, and, even had the NMED presented its case before the bankruptcy court allowed abandonment, the merits did not support a decision denying abandonment. The bankruptcy court's ruling does not indicate that the NMED's failure to object in a timely fashion was a legally independent reasons to deny its motion, nor did the court say that such failure constituted a waiver by NMED or resulted in a bar to NMED's challenge of the abandonment orders. Indeed, the court ruled on the merits of the NMED's evidence. We do likewise.

contaminated sites, indicating that the NMED was not considering further testing or investigation of the site, 2) there was insufficient data from which the NMED's own expert could state that Capitan was a present threat, and 3) the trustee's only violation of state law at the time of abandonment was failure to file reports. Under these facts, we agree with the bankruptcy and district courts that Capitan did not pose an immediate threat to public health or safety. Accordingly, the bankruptcy court's order allowing abandonment of that property did not violate *Midlantic*.

The judgment of the United States District Court for the District of New Mexico is AFFIRMED as to the Capitan site. As to the Carrizozo and Midtown sites, this appeal is DISMISSED as moot, and the action REMANDED to the district court to vacate that part of its order as moot and to remand to the bankruptcy court with directions to vacate its abandonment orders and its denial of reconsideration as to those two properties. See Beattie, 949 F.2d at 1095 (citing United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF NEW MEXICO

IN RE:

L.F. JENNINGS OIL COMPANY,
EIN 85-0128945,

Debtor. Bankruptcy No. 7-90-04081 ML

NEW MEXICO ENVIRONMENT DEPARTMENT,

Movant/Appellant,

vs. Civ. No. 92-553 LH/WWD

JOHN F. FOULSTON, SUCCESSOR TRUSTEE
FOR THE ESTATE OF L.F. JENNINGS OIL
COMPANY, Debtor,

Respondent/Appellee.

Filed November 30, 1992

MEMORANDUM OPINION AND ORDER

This matter comes before the Court upon New Mexico Environment Department's (NMED) Notice of Appeal, filed May 29, 1992, and Appellee John E. Foulston's Motion to Dismiss NMED's Appeal as Moot with Respect to Midtown Mart 1 and Carrizozo Mart, filed September 2, 1992. NMED appeals to this Court from a final Bankruptcy Court order denying NMED's motion to reconsider and quash abandonment entered on May 18, 1992. In determining the motion to reconsider and quash abandonment, the Bankruptcy Court held an evidentiary hearing on April 27, 1992, and made an oral ruling on May 5, 1992.

STATEMENT OF THE ISSUE

NMED states that the issue in this appeal is "whether the Bankruptcy Court can approve abandonment of contaminated estate property without first requiring the trustee to comply with state environmental laws and regulations designed to protect public health and safety." NMED's Brief-in-Chief at 1-2, filed Sept. 1, 1992. Appellee (trustee) contends that the issue is "[w]hether the Bankruptcy Court can approve abandonment of property of the estate that allegedly violates state environmental laws and regulations designed to protect the public health, where the evidence at the evidentiary hearing failed to establish that there was imminent and identifiable harm to the public health and safety?" Appellee, John E. Foulston, Successor Trustee's Brief In Chief at 2, filed Sept. 16, 1992.

Both versions of the issue are based on the holding in *Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, *rehr'g denied*, 475 U.S. 1090 (1986). *Midlantic* held that "a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." *Id.* at 507. The Supreme Court added in footnote 9 that the exception to abandonment is narrow and "does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm." *Id.* at fn. 9. Considering *Midlantic* in its entirety, the issue in this appeal is like that proposed by the trustee, i.e., whether the Bankruptcy Court can approve abandonment of property of the estate which violates state law reasonably designed to protect the public's health or safety if NMED fails to demonstrate the existence of an imminent and identifiable harm to the public's health and safety. See *In re Shore Co., Inc.*, 134 B.R. 572, 578 (Bankr. E.D. Tex. 1991).

STANDARD OF REVIEW

In reviewing a bankruptcy decision, this Court will review legal determinations on a *de novo* basis and factual findings under a clearly erroneous standard. *Virginia Beach Federal Sav. and Loan Ass'n v. Wood*, 901 F.2d 849, 851 (10th Cir. 1990) (citing *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540, 1543 (10th Cir. 1988)). The facts are not contested in this case, but rather the legal significance of those facts is in dispute. Accordingly, the standard of review for this appeal is a *de novo* one.

STATEMENT OF THE CASE

A. PROCEDURAL SUMMARY

Three bankruptcy estate properties are at issue in this appeal. They are known as the Carrizozo Mart (Carrizozo), Midtown Mart 1 (Midtown), and the Capitan Mart (Capitan). When the trustee learned that the three properties contained underground gas tanks and hydrocarbon contamination, he contacted NMED as required by law. See Vol. II of Record on Appeal, NMED Exhibits 1, 2, and 3. Having determined later that the properties should be abandoned, the trustee filed his motion to abandon in Bankruptcy Court. Vol I of Record of Appeal at 45. Notice of the motion to abandon was not sent to NMED because it did not file a claim with the Bankruptcy Court nor did it enter an appearance with the Bankruptcy Court. Vol. III of Record on Appeal at 6. The Bankruptcy Court subsequently entered an order approving the abandonment. Vol. I of Record on Appeal at 111. Following the entry of the order approving abandonment, NMED filed a motion to reconsider the order and quash the abandonment. *Id.* at 133.

The Bankruptcy Court denied the motion to reconsider and quash the abandonment for two reasons. First, the Bankruptcy Court found that NMED had notice of the pending bankruptcy and should, therefore, have entered an appearance and filed a request for notice. Vol. IV of Record on Appeal at 2. Second, the Bankruptcy Court found that the properties caused no imminent danger to the public. *Id.*

B. FACTUAL SUMMARY

The trustee initially tested the three sites for environmental problems because potential purchasers wanted to know what environmental contamination liabilities would come with the properties. Vol. III of Record on Appeal at 4. The underground gas tanks tested at two of the three sites were found to be tight. *Id.* at 7. Moreover, the trustee sold the fuel in the tanks to raise money for the estate and otherwise minimize any chances of fuel leakage. *Id.*.

At the time the motion to abandon was filed, the three properties were in compliance with the Underground Storage Tank (UST) regulations. *Id.*. at 27. The properties were later in violation of the UST regulations because the trustee failed to conduct an on-site investigation to determine the extent

of contamination and NMED had not received a reclamation proposal. *Id.*. at 28-29. UST regulations also required a hydrogeological report for the Midtown site. *Id.*. at 29.

As of March 1992, the Midtown and Carrizozo properties ranked 366 and 405, respectively, on the State List of Contamination Sites for First Priority Correction Action. Vol. II of Record on Appeal, NMED Exhibit 14. According to testimony by a NMED witness, it would take NMED four to six years before it could clean the Midtown and Carrizozo sites. Vol. III of Record on Appeal at 40. NMED did not list the Capitan site. *Id.*. at 9.

In a letter dated May 21, 1992, NMED found the Carrizozo site to "not pose an immediate public health or environmental threat" because contaminated soil had been excavated and the underground tanks removed. Exhibit A (attached to the trustees's Motion to Dismiss Appeal as Moot). NMED concluded that "the investigation and remediation at the above referenced site [was] essentially complete except for the process of remediating excavated soils to below the state standard...." *Id.*. In a letter dated June 15, 1992, the NMED stated that if the underground storage tanks were removed at the Midtown site, there would be no liability under the UST regulations. Exhibit C (attached to the trustee's motion to dismiss appeal as moot). The letter noted that, in fact, the tanks were removed. *Id.*. Subsequent purchasers of the Carrizozo and Midtown sites performed the above clean up activities.

DISCUSSION

A. TRUSTEE'S MOTION TO DISMISS

Since NMED filed this appeal, the Midtown and Carrizozo properties have been cleaned up to the satisfaction of NMED. See *supra,* Factual Summary. Because those two properties are now acceptable to NMED, the trustee argues that NMED's appeal is moot as to those properties and this appeal should therefore be dismissed as to those properties. In general, "[i]f events transpire during the pendency of the [bankruptcy] appeal which prevent the appellate court from granting effective relief, the appeal will be dismissed as moot." *In the Matter of T & H Diner, Inc.,* 108 B.R. 448, 452 (D.N.J. 1989). The relief NMED seeks is a declaration that the Bankruptcy Court's approval of the abandonment was error because the trustee did not comply with the state environmental laws protecting the public health or

safety before seeking to abandon the properties. Since the Midtown and Carrizozo properties are now acceptable to NMED, NMED no longer wants this Court to order the trustee to retake possession of those properties.

I fail to understand how a declaration regarding the propriety of the Bankruptcy Court's granting a motion to abandon could be affected by subsequent activities which the Bankruptcy Court did not know would transpire. Thus, I find that the fact those activities occurred does not prevent this Court from granting the relief NMED seeks. Accordingly, the appeal is not moot as to the Midtown and Carrizozo sites. The trustee's motion to dismiss this appeal as moot should, therefore, be denied.

B. APPLICATION OF *MIDLANTIC*

In applying *Midlantic's* exception to abandonment, this Court must determine whether there was a risk of imminent harm or immediate danger to the public at the time of abandonment. See *In re Doyle lumber, Inc.*, 137 B.R. 197, 202 (Bankr. W.D. Va. 1992). NMED's priority cleanup list is indicative of how NMED perceives the risk of harm to the public of certain contaminated sites. That list, however, does not contain the Capitan site. Moreover, the Carrizozo and Midtown sites were ranked relatively low on the list. Consequently, it would take the NMED four to six years before it could clean up those two sites. Furthermore, at the time of abandonment, the trustee determined that the tanks, piping and lines at Capitan and Carrizozo were tight and thus did not present a fuel leakage problem. To prevent any leaks from occurring, the trustee also removed the fuel from the tanks.

A witness for NMED testified that the primary health and safety impact at the Midtown site was a potential for an explosion in confined spaces. Vol. III of Record on Appeal at 43-45. According to the witness, potential for explosion or human exposure was present at each site. *Id.*. at 44. The Notices of Violation sent to the Trustee on the three sites also noted that "[p]otential harm may result from this contamination ...." Vol. II of Record on Appeal, NMED Exhibits 10, 12, and 13 (emphasis added).

The Field Investigation Report on the Capitan property noted that soil contamination was found at the pump island and suspected near the tank hold. Vol. II of Record on Appeal, NMED Exhibit 15. The field investigators at the Capitan property did not know if a water supply was threatened. *Id.*.

The field Investigation Report on the Carrizozo site noted that soil contamination was found north of the building but was only suspected between the pump islands. Vol. II of Record on Appeal, NMED Exhibit 16. The report indicated that the nearest public water supply well was over 1.5 miles away and all nearby residences and businesses were on a public water supply. *Id.*. Finally, the report stated that limited contaminant excavation by the potential buyer may remediate the Carrizozo site. *Id.*.

The Field Investigation Report on the Midtown site showed that soil contamination seemed to be limited to the area around the tank hold. Vol. II Record on Appeal, NMED Exhibit 17. In addition, the report verified ground water contamination. *Id.*. However, the report indicated only that the Rio Ruidoso and supply wells along its course may be in jeopardy. Id. The report stated that limited contaminant excavation by a potential buyer may remediate the on-site contamination but would not address probable off-site contamination. *Id.*

The above evidence does not show the existence of a present immediate menacing harm to the public on the properties at issue. Rather, the risk of imminent harm was speculative at the time of the abandonment as evidenced by various statements concerning the "potential" harm which could occur on the sites. Moreover, the NMED did not consider the risk of harm to be great as demonstrated by its clean up ranking of the Midtown and Carrizozo sites and the failure to rank the Capitan site at all. I conclude that the NMED failed to demonstrate the existence of an imminent and identifiable harm at any of the three sites so as to justify prohibiting the trustee from abandoning those sites although they were in violation of state laws intended to protect the public's health and safety.

WHEREFORE, IT IS ORDER that the Bankruptcy Court's Order denying NMED's motion to reconsider and quash abandonment is affirmed.

S/ LeRoy Hansen
UNITED STATES DISTRICT JUDGE

For Appellant: Geoffrey Sloan, Esq. and Felicia L. Orth, Esq.
Special Assistant Attorneys General

For Appellee: James R. Jurgens, Esq.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:
L.F. JENNINGS OIL COMPANY,
EIN 85-0128945,

Debtor. No. 7-90-04081 ML

Filed May 18, 1992

ORDER DENYING NMED'S MOTION TO QUASH AND RECONSIDER ABANDONMENT

This matter has come before the Court on the motion of the New Mexico Environmental Department ("NMED") to quash and reconsider the chapter 7 trustee's abandonment of property of the estate of L.F. Jennings Oil Co., debtor, known as the Capitan Mart, the Carrizozo Mart, and Midtown Mart 1. The Court having heard testimony of witnesses and arguments of counsel finds that NMED's motion is not well taken and should be denied.

IT IS THEREFORE ORDERED that New Mexico Environmental Department's motion to quash and reconsider abandonment is denied.

S\MARK McFEELEY
U.S. BANKRUPTCY JUDGE

Respectfully submitted,

JURGENS, TALLMADGE & WITH, P.A.

S/
James R. Jurgens
Attorneys for trustee
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(505) 984-2020

Approved as to Form:

NEW MEXICO ENVIRONMENTAL DEPARTMENT
OFFICE OF GENERAL COUNSEL

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Copy to:

United States Trustee
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:
L.F. JENNINGS OIL COMPANY,
EIN 85-0128945,

Debtor. No. 7-90-04081 ML

Filed June 12, 1991

ORDER APPROVING TRUSTEE'S
ABANDONMENT OF PROPERTY OF THE ESTATE

This matter has come before the court on the motion of Harley Swink, chapter 7 trustee for the estate of L.F. Jennings Oil Co., debtor ("Trustee"), to abandon as burdensome or of inconsequential value and benefit to the bankruptcy estate the properties known as the Midtown Mart 1 located at 2505 Sudderth Drive in Ruidoso, New Mexico ("Midtown Mart 1"), and the Bulk Plant and Warehouse located in Alamogordo, New Mexico ("Bulk Plant"). Gibb and Elizabeth Munro ("Munro") filed an objection to the Trustee's proposed abandonment, which objection has now been withdrawn. The Court has heard arguments of counsel, is fully advised in the premises and is informed that the motion is well taken and should be granted.

IT IS THEREFORE ORDERED that the Trustee's abandonment of Midtown Mart 1 and the Bulk Plant is approved.

S/_____
Mark B. McFEELEY
U.S. BANKRUPTCY JUDGE

Respectfully Submitted,

JURGENS & KING, P.C.

S/_____
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Leslie C. King III
Attorneys for the Trustee

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APPROVED AS TO FORM:

SOMMER, UDALL, OTHMER, HARDWICK

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:
L.F. JENNINGS OIL COMPANY,
EIN 85-0128945,

Debtor. No. 7-90-04081 ML

Filed July 12, 1991

ORDER APPROVING TRUSTEE'S
ABANDONMENT OF PROPERTY OF THE ESTATE

This matter has come before the court on the motion of Harley Swink's, chapter 7 trustee for the estate of Jennings Oil Co., debtor, to abandon as burdensome or of inconsequential value and benefit to the bankruptcy estate, all remaining property of the estate, including but not limited to the gasoline stations and convenience stores known as the Capitan Mart in Capitan, New Mexico and the Carrizozo Mart in Carrizozo, New Mexico, except for the following:

1. Unimproved lot in Capitan, New Mexico;

2. Lots and improvements, if any, in Alto Lakes, New Mexico;

3. Accounts receivable;

4. Tax, insurance or other refunds;

5. Cash accounts and funds;

6. Unscheduled assets of any kind;

7. Lots and improvements, if any, in the Lamay estates;

The Court finds that notice of the trustee's motion to abandon was mailed to all creditors, counsel of record and parties in interest and that no objections were filed to the trustee's proposed abandonment of the remaining property of the Estate, excepting the property set forth in 1-7 above.

IT IS THEREFORE ORDERED that the trustee's abandonment of the property of the estate as set forth in this order is approved.

_____
MARK B. McFEELEY
U.S. BANKRUPTCY JUDGE

Respectfully Submitted,

JURGENS & KING, P.C.

S/_____
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE:

L. F. JENNINGS OIL COMPANY,
Employer ID# 85-0128945, Case No. 7-90-04081 ML

Debtor,

ORAL RULING

BE IT REMEMBERED that the above entitled matter came on for hearing in the United States Bankruptcy Court before the Honorable Mark McFeeley, commencing at 1:35 p.m. on May 5, 1992, in Albuquerque, New Mexico, before Suzan E. Smith, a Notary Public and Court Reporter.

APPEARANCES

GEOFFREY SLOAN (By telephone)
Assistant General Counsel
1190 St. Francis Dr. #N-4050
Santa Fe, NM 87502

JAMES R. JURGENS
Attorney for Trustee
322 Montezuma St., Ste #A
Santa Fe, New Mexico 87501

* * * * *

THE COURT: We're here in the Jennings Oil Company case, 7-90-004081 for ruling on the New Mexico Environment Department's Motion to Set Aside the Order of Abandonment. Mr. Jurgens is here for the Trustee. Mr. Sloan for the movant.

I've looked over all your stuff and it seems to me that the motion ought to be denied, Mr. Sloan, for the following reasons: Number one, it seems to me that the State had notice of the pendency of the bankruptcy and could have and should have entered an appearance and filed a request for notice.

Number two, it seems to me that even had you had notice, if you made the same presentation, that I would have granted the Trustee's right to abandon. The only possible imminent danger the State presented to me was the fact that some of these tanks still had some small amount of liquid still in them, and maybe if the motion was timely opposed I would have ordered the estate to cause the rest of those to be pumped out. But there wasn't any evidence that I found credible that those tanks were currently leaking, particularly in light of the tests that the Trustee caused to be conducted, which provided a result that that was not the case, and the testimony of your witnesses that seem to indicate that much of what they found was probably diesel which wasn't in the tanks and most likely was from older spills.

I understand the State's position and I don't want you to think that we're going to ignore what I would consider even a reasonably likely environmental degradation, but I don't think that's what you have in this case. I mean, the State's biggest complaint in this case seems to be that the Trustee's order of — or the Order of Abandonment was issued one day after the Trustee was supposed to file some other kind of report and I don't think that rises to the level of what the Supreme Court was talking about in the Midlantic case where they were talking about an imminent danger to the public.

Anyway, for those reasons I'm going to deny the motion and I'd ask Mr. Jurgens to prepare an order, have it approved as to form by Mr. Sloan and present it to the Court for entry, please.
.... {END}

* * * * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE:

L. F. JENNINGS OIL COMPANY,
Employer ID# 85-0128945, Case No. 7-90-04081 ML

Debtor,

[TRANSCRIPT EXCERPTS] MOTION TO RECONSIDER AND QUASH ORDER OF ABANDONMENT

BE IT REMEMBERED that the above entitled matter came on for hearing in the United States Bankruptcy Court before the Honorable Mark McFeeley, commending at 9:00 a.m. on April 27, 1992, in Albuquerque, New Mexico, before Suzan E. Smith, Notary Public and Court Reporter.

APPEARANCES

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Santa Fe, New Mexico 87501

* * * * *

THE COURT: L. F. Jennings Oil Company, case 7-90-04081 for final hearing on the New Mexico Environment Department's Motion to Reconsider and Quash the Order of Abandonment.

* * * * *

JAMES BEARZI

was called as a witness, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SLOAN

Q. Mr. Bearzi, will you please give your name and spell it for the record.

A. J-a-m-e-s, James Bearzi, B-e-a-r-z-i.

Q. How are you employed?

A. I'm the acting Bureau Chief for the Underground Storage Tank [Bureau] with the New Mexico Environment Department.

Q. In that position, what are your duties?

A. I oversee the Bureau staff and their efforts to enforce the New Mexico Underground Storage Tank Regulations.

Q. How long have you worked for the Underground Storage Tank Bureau?

A. I was initially employed in January, 1989, through January, 1990, left, came back in February, 1991, until the present.

Q. Could you please describe for the court your educational experience?

A. I have Bachelor of Science degree in Geology and Geography, a Masters in Earth Science degree, as well as two years of course work toward a Ph. D. in Geology.

Q. Have you had any training or education directed to performing your

duties while you've been at the Underground Storage Tank Bureau?

A. I have. I've subsequently taken graduate courses in geology, continuing education in contaminant migration, underground storage tank technology, management administration, et cetera.

Q. Would you define the science of geohydrology for the Court?

A. Geohydrology is the study of the earth in its interaction with waters as they occur on the surface, in the groundwater, as well as in the soil.

MR. SLOAN: Your Honor, I would move that Mr. Bearzi be qualified as an expert in geohydrology.

MR. JURGENS: Your Honor, we don't have any objection to that.

THE COURT: All right.

* * * * *

Q. Mr. Bearzi, I've handed you what have been marked and admitted as Exhibits 1 through 14 and if we could just go through them quickly, what does Exhibit 1 show?

A. Exhibit 1 is the form that is filled out when a release is first reported. This Exhibit 1 documents the phone call between Mr. Jurgens and myself on March 28, 1991, reporting a release at the Ruidoso site.

Q. All right, what does Exhibit 2 show?

A. It's a similar document. This reports a release at the Carrizozo site, again a phone conversation between Mr. Jurgens and myself on March 28, 1991.

Q. What does Exhibit 3 show?

A. Similar memorandum of a phone conversation between Mr. Jurgens and myself on April 19, 1991, reporting a release at the Capitan site.

Q. What does Exhibit 4 show?

A. Exhibit 4 is a letter from Mr. Jurgens to myself confirming the telephone conversations that we had had in March on the Carrizozo site and the Ruidoso sites. And it reports the same information that we had talked about by phone as well as some additional information about some sampling results that ILFC had obtained?

Q. Does Mr. Jurgens characterize that letter at the outset?

A. The letter states that the letter confirms our telephone conversation this morning and will complete our compliance with the State of New Mexico's regulations concerning notice to EID of contamination from underground storage tanks.

Q. All right. Could you say what Exhibit 5 shows?

A. Exhibit 5 is a letter from Anthony Morgan of the Underground Storage Tank Bureau staff. He's in the remediation section to Mr. Swink who was identified as the Trustee of the estate by Mr. Jurgens in his telephone conversations with myself. The letter essentially states that we have received notification and enclosed our regulations since it is a confirmed release there are certain steps that must be taken now to investigate and remediate the release.

Q. Now, you speak of certain steps that need to be taken. Where are those steps set out?

A. Those steps are set out in part 12 and 13 of the New Mexico Underground Storage Tank Regulations.

MR. SLOAN: Your Honor, I have previously submitted to your law clerk a copy of the New Mexico Underground Storage Tank Regulations and would ask that you take judicial notice of those regulations.

MR. JURGENS: I have no objection to that, Your Honor.

THE COURT: Okay.

* * * * *

Q. Mr. Bearzi, in connection with part 12 of the Underground Storage Tank Regulations, can you say whether Jennings Oil Company was in compliance with the requirements on April 10, 1991?

A. Our records indicate that these sites and Jennings Oil was in compliance on that date with part 12 of the Underground Storage Tank Regulations.

Q. Was the station at Ruidoso in compliance with the Underground Storage Tank Regulations on June 12, 1991?

A. The station in Ruidoso was not in compliance on that date. By that time, the Department should have been in receipt of an informal report of the on-site investigation which would have identified the vertical and horizontal and up soil contamination, including termination as to whether groundwater has been affected. Also, the Department should have been in receipt of the final report of that investigation and the day before that date the Department should have been in receipt of the hydrogeological investigation. So the Ruidoso site was not in compliance at that time.

Q. Disregarding ownership for the moment, is the Ruidoso site in compliance today?

A. It is not.

Q. How is it in violation?

A. The on-site investigations that determine the extent of soil contamination and whether groundwater has been affected has not been completed or, if it has, the Department is not in receipt of that report. That report is pursuant to part 1206 of the Underground Storage Tank Regulations. Department has not received the hydrogeological report. It is my understanding that groundwater has been affected at that site by the release.

Therefore, a hydrogeological report is required. We have not received that reclamation proposal. It should have been submitted to the Department pursuant to the regulations and reclamation, should have been implemented as well and by now the Department should have been well into receipt

of the second or third quarter of monitoring every reclamation system to clean up the groundwater and soil at that site. These things have not been received and so that site would be considered not in compliance.

THE COURT: So you're telling me that the non-compliance is the failure to provide reports, is that basically what I'm hearing you tell me?

A. Yes, Your Honor, and also that these reports document work that should have been done at the site.

THE COURT: Okay.

Q. Were the sites at Carrizozo and Capitan in compliance on July 12, 1991?

A. They were not for the same reasons that the Ruidoso site was not. However, if through an on-site investigation, which the Department did not receive any documentation that had been performed, if they had determined that the greatest vertical extent of soil contamination was greater than 50 feet above the water table, a hydrogeological investigation would not have been required.

Q. In your experience at NMED Underground Storage Tank Bureau and as its acting Chief, have you become acquainted with the impact of human exposure to petroleum products?

A. I have.

Q. What are those impacts?

A. Benzene is probably the most commonly known gasoline constituent. It's a known carcinogen, mutagen and teratogen. Other constituents of gasoline that are less well known also have similar impacts. These are if the contaminant is ingested or inhaled some other way. Gasoline constituents also can be a health impact if they accumulate in confined or semi-confined spaces like an empty tank or basement or a sewer line and if an oxygen source and an ignition source is available, explosions can occur, not unlike those that were experienced in Guadalajara earlier this week.

Q. Based on the documents that you've testified to here and your education, professional expertise in geohydrology and given you're acting Chief of New Mexico Underground Storage Tank Program, do you have an opinion as to the seriousness of the size at Capitan Carrizozo and Ruidoso?

A. I do.

Q. What is your opinion?

A. All of these sites pose serious environmental health and safety threats. However, there are varying degrees of seriousness. Ruidoso, with the data that we have so far available to the Department is by far the most serious threat because groundwater contamination by the release has been confirmed. It has been confirmed in a manhole where water has been sampled. Therefore, the potential for an explosion problem through accumulation of potentially explosive vapors is very real under those until the contamination in the soil matrix and the groundwater is removed. That will not go away. The contamination in the groundwater is also connected to Ruidoso and that aquifer is also the primary drinking supply for that whole area downstream of the site. With the evidence that we have so far, that is by far the most serious threat.

The Capitan and Carrizozo sites simply have not been investigated enough to determine what types of impacts they have, whether they affect groundwater, whether the contamination in the soil has impregnated or permeated any water supply lines or sewer lines. As long as the certainty is unknown, that potential exists. It's not a potential at the Ruidoso site, however. It's very real.

Q. What minimum action do you think should be taken at these three sites to address the problems?

A. Minimum actions at all three sites include removing all fluids from the tanks, the department's investigation reveals that in some of the tanks at some of the sites there's up to several inches of product still in the tanks as well as water and other fluids. The products should be removed because those fluids can create a lead on contaminants tied up in the soils and can drive them further to groundwater. So the fluids should be removed from the tanks. The tanks should be removed from the ground, which will do two things.

One, it will keep contamination of potentially explosive vapors from accumulating in the tanks. Also, it will keep people from putting products illegally in the tanks, as these sites are abandoned right now, and also it will aid in the investigation and the remediation. As you remove a tank, a large amount of soil is usually removed with it and that, in these case, would likely be contaminated soil. So that would go a long ways towards remediating these sites.

At the Ruidoso site, further work needs to be done. At a minimum, to define the horizontal extent of groundwater contamination and to determine and to mitigate the effects of soil and groundwater contamination on any confined spaces like sewer spaces or man ways.

Q. Do you have an opinion whether there is a potential for harm on the public health for the extension of Lincoln County in the absence of the minimum steps you have described.

* * * * *

A. Yes, I do.

Q. What is your opinion?

A. My opinion is that the Ruidoso site, toxicology notwithstanding the toxic effects of actually ingesting these products into your body, the explosive — potentially explosive problems are by far a greater risk right now and that would again be the presence of vapors that have emanated from the release site and contamination in the soil matrix and the groundwater into confined spaces such as the man way that the Department sampled and other sewer lines and other utility man ways that humans may enter at the Carrizozo and Capitan sites. This potential still exists but, again, it's more of a potential simply because further investigation has not been completed to define where this contamination is.

* * * * *

HARLEY SWINK

was called as a witness, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JURGENS:

Q. Sir, can you please state your name for the record?

A. Harley Howard Swink.

Q. Mr. Swink were you appointed as the Chapter 7 Trustee in the L. F. Jennings bankruptcy case when it was filed?

A. I was.

Q. Do you recall when that was filed, Sir?

A. The 20th of December was the date that was filed of 1990.

Q. And for how long did you serve as Trustee in this case, Mr. Swink?

A. Until approximately the end of February or the beginning of March this year.

Q. So you were the Trustee in this Chapter 7 case when all these events went on with respect to these problems?

A. I was.

Q. When you took over as Trustee, did you examine the Debtor's Schedules and Statement of Affairs?

A. I did.

Q. And what kind of assets did the debtor have?

A. The debtor owned real property outright, had had contract interest in real property, accounts receivable, had fuel inventory, it had food and convenience store inventory.

Q. Were three of the debtor's assets the Carrizozo, Capitan and Midtown Mart One stores?

A. Yes, three of five filling stations that had operated.

Q. At that time, what did you understand your duty to be as Trustee to the estate?

A. Collect the assets, figure out if they were secured or unsecured, convert them to cash the best way I could and pay the debts.

Q. Could you tell from the schedule that this debtor filed, as to whether or not these three assets in question were encumbered by liens?

A. Not totally, because the schedules filed, in fact I don't think they've been corrected since then, were incomplete.

Q. Did you subsequently find out whether all of the information contained on those schedules was accurate?

A. Yes, I did.

Q. Have you confirmed that all the information was accurate?

A. No. I thought the question was did I find out if it was accurate. I found out it was not accurate, not complete or accurate.

Q. Mr. Swink, you stated that there were liens against these properties. Did you have liens on any of the properties at the time you went to sell them?

A. Attached to the Petitions and Statements were some real estate appraisals and I'm trying to think whether any of the lien documents are attached as exhibits to that, and there may have been, but they were not complete.

Q. Whether you were — well, let me ask you when, approximately, did you attempt to market these three properties?

A. Starting in February of 1991 on through March and April.

Q. What, if anything, did you have to do before you could sell these assets?

A. Well, I had to figure out first of all who owned the property and what the debt was and also because the property in questions included underground storage facilities for gasoline and petroleum products, they would have to be tested because any purchaser would want to require that as a requirement before buying the property.

Q. Did the estate undertake to have these properties tested for soil and tank

problems?

A. Yes, it did.

Q. And did the estate hire any salesperson or anything to sell these properties?

A. Yes, fairly contemporaneous with that, we hired a real estate company in Ruidoso to market all of the real property of the estate.

Q. Mr. Swink, at the time you attempted to sell these properties, were you aware of the number or the extent of the FDIC liens against them?

A. No.

Q. When did you first make an effort to obtain that information from the FDIC?

A. February, 1991.

Q. Were your attempts successful?

A. I didn't get the information until April of that year. I don't think it was successful in the sense that it was not timely provided.

Q. Do you recall when the estate received the confirmation from its soil test as to contamination?

A. There seems to be one or two weeks there that all of this kind of came to the surface all at once. It would have been the early part of April 1991.

Q. And did you, as Trustee, attempt to market and sell the Carrizozo property?

A. Yes.

Q. Were you able to do so?

A. I had a firm purchase offer with a Mr. Leslie. He was the second purchaser that had come forward and shown a serious desire to buy the property.

Q. Did the estate file a motion to sell the property?

A. Yes, they did.

Q. Did that sale ever occur?

A. No, it did not.

Q. Why not, sir?

A. Primarily the FDIC came and objected to the sale of that property as being over encumbered.

Q. What were the bases for the FDIC objection to the sales of that and other properties in this case?

A. That they had a cross collateralization language on some of their language and made a claim in excess of four hundred and, as I remember, fifty thousand dollars on both the real property lease hold improvements and inventory.

Q.
Based on the real estate appraisals at your disposal at that time, did you make a determination as to whether the estate had any equity in those assets?

A. Yes, at that time it appeared that the estate had no equity in the real property, the improvements or the inventory.

Q. So what did you do as Trustee, sir?

A. Directed my attorney to file abandonments.

Q. Mr. Swink, why would the estate agree to abandon these properties instead of proceeding to create a bunch of reports as Mr. Sloan would have liked and continue to sell them?

A. Well, we were spending money that belonged to unsecured creditors trying to sell property that belonged — or the mortgage holder FDIC did not want us involved in selling or further preservation or did not want us to

have anything to do with the property and that would simply have consumed an enormous amount of time and effort and cost to no benefit.

Q. How much of the estate's money did you expend on these properties?

A. I can't tell what utilities payments were made but in the testing, the removal of product and its ultimate sale, the filling of the tanks with water for pressure testing, the removal of that, my memory would be that we spent about $10,000.

Q. Can you tell us, this is in evidence but just briefly, what did the soil tests show on these three properties?

A. Capitan was right at the point where we had to report contamination. Carrizozo Mart was, in my estimation, medium contaminated; that is, under 200 parts per million, a 136 maybe an average, and Midtown One, which is the 2505 Sudderth address, looked like it was contaminated.

Q. With this information what did you do as Trustee?

A. I had a conversation with you and we immediately — my recollection was about 24 hours or so after we heard, and I think that was even in informal report from the testing company that there maybe a problem there, you wrote a letter on behalf of the estate to the appropriate Bureau saying that we may have a problem.

Q. At this time, Mr. Swink, and I'm talking about early April, say the first week in April of last year, what agreement, if any, did the estate reach with the FDIC concerning its liens against these assets?

A. Well, up until that time starting with conversations with their representatives in Newport Beach, California, they encouraged the estate to go ahead and preserve the property and market it and convert it to cash as quickly as possible. If one thins for a moment we've got five filling stations, it's the middle of winter, they're on unheated and unattended that's whey we kept the utilities going and reports of teenagers trying to break in and get candy bars and that sort of thing. They were concerned about the safety of that property, the conversion of that property as quickly as possible to cash.

Q. Did that occur in April of 1991?

A. Yes, it did.

Q. So what happened between the FDIC and the estate at that time?

A. Complete reversal on their position to "Please take care of our property and market it and give us the most amount of money you can, " to "We don't want you to go anywhere near the property. We don't want you to have anything to do with it."

Q. As a result of meetings with the secured creditors in April, what did the estate do, sir?

A. Made the determination that the property was over-encumbered, that any questions as to the validity or extent of their liens would — that any questions that remained would — I'm sorry, I'm bogged down on this — but there was still some questions as to the validity and extent of liens but it didn't appear that any money that the estate would expend to have those questions determined by a Court would be offset by any gain to the unsecured creditors or the estate if it should prevail on those questions.

Q. Did the estate file a Motion to Abandon these three properties?

A. Yes, it did.

Q. Do you recall when that was done?

A. The first part of April would be my memory, 9th, 10th, something like that.

* * * * *

Q. Mr. Swink, can you tell us what role the FDIC played in this case after April, 1991?

A. Other than requiring the Trustee to step aside and reclaim its property?

Q. Do you recall the FDIC filing a Motion Seeking Relief From Stay on their liens on these properties?

A. Yes, they did.

Q. Was an Order entered by the Court?

A. Yes, I believe it was.

* * * * * {END}

STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD
1190 St. Francis Drive
Santa Fe, New Mexico 87503

EIB/USTR-12

UNDERGROUND STORAGE TANK REGULATIONS

PART XII

CORRECTIVE ACTION FOR PETROLEUM UST SYSTEMS

§1200 GENERAL

A. All releases, including releases described in subsection B below for which full compliance with this Part XII is not required, must be cleaned up through soil remediation, ground and surface water remediation and any other appropriate procedures, in a manner protective of health, public welfare and the environment as guided by these regulations.

B. Upon confirmation of a release pursuant to USTR §700 or identification of a release in any other manner, owners and operators of petroleum UST systems must comply with the requirements of this Part XII if the release:

(1) is of unknown volume or is greater in volume than 25 gallons where the depth to groundwater is 100 feet or less; or

(2) is of unknown volume or is greater than 100 gallons in all other areas; or

(3) has reached or threatens to reach ground or surface water; or

(4) has left a sheen on surface water; or

(5) notwithstanding the above exclusions, when a release of any size has occurred and the owner or operator is directed to comply with all or part of this Part XII by the division.

C. All written notices and reports required to be submitted to the division may be mailed or delivered to the following address:

Underground Storage Tank Bureau
Environmental Improvement Division
1190 St. Francis Drive
Santa Fe, New Mexico 87503

All oral notices may be delivered by telephoning the UST Bureau at (505) 827-0188.

D. The time deadlines set forth in this Part XII are computed from the date of the confirmation or other identification of a release unless another event is specified in these regulations. A summary timeline of the corrective action requirements is attached to this Part XII as Appendix A, and a flowchart outlining the corrective action process is attached as Appendix G.

E. When the owner and operator are both responsible for compliance with any provision of these regulations, they may designate a representative to take primary responsibility for complying with these regulations. The division encourages the designation of a representative, although the designation of such a representative will not affect the division's right to seek compliance at any time from the owner or the operator or both. The designation of a representative is intended to facilitate compliance with these regulations and will not relieve the owner and operator of their legal liabilities or responsibilities under these regulations.

F. If a release constitutes a hazardous substance incident under the provisions of the Hazardous Waste Act relating to hazardous substance incidents, those provisions may apply in addition to these regulations.

[Section 1201—DEFINITIONS deleted.]

§1202 INITIAL RESPONSE

A. Upon confirmation or identification of a release involving a petroleum UST system, the owner and operator of the UST system shall:

(1) notify the division within 24 hours pursuant to USTR §204;

(2) notify local fire authorities, when available; and

(3) immediately prevent any further release from the UST system by whatever means necessary, including removing product from the UST system, or any part of the UST system which is known to leak or is suspected of leaking. If necessary, the UST system should be removed from service.

B. If highly contaminated soils are present, the provisions of §1209 must be followed.

§1203 INITIAL ABATEMENT

Unless directed to do otherwise by the division, the owner and operator must undertake the following initial abatement and site investigation procedures within 72 hours of the confirmation or other identification of the release:

A. Water Supply Impacts.

(1) Unless the release will be cleaned up within 72 hours to the standards set out in these regulations, and it can be demonstrated that the release has not moved beyond the excavation area, as defined in USTR §102, owners and operators must identify the location of any private water supply within a 1000 foot radius or public water supply within a 1 mile radius of the UST system. All necessary measures must be taken to ensure that these water supplies do not become contaminated.

(2) Releases which present an immediate threat of contamination to or are within 500 feet of a surface water course must be contained or cleaned up as soon as practicable to prevent contamination of surface water. If the surface water course is a drinking water supply, the owner(s) or operator(s) of all downstream water supplies likely to be affected by the release must be alerted to possible contamination within 24 hours.

(3) If the release has already contaminated a water supply, the owner and operator must immediately provide a temporary replacement drinking water supply, as well as adequate warnings or other mechanisms to prevent persons from drinking or otherwise contacting contaminated water. Within 7 days, a replacement water supply must be provided which is of adequate quality and quantity for drinking, bathing, cooking and washing. The replacement water supply must be maintained until an alternate water supply sufficient for all domestic purposes is available.

B. Vapors.

(1) An investigation must be completed within 72 hours to determine whether potentially explosive or harmful vapors are present in any building, utility corridor, basement, or other surface or subsurface structure on or adjacent to the release site. This investigation should include testing for vapors using the following:

(a) a combustible gas indicator or equivalent instrument, calibrated for pentane, to test for potentially explosive levels of petroleum hydrocarbon vapors, and

(b) a photoionization detector, flame ionization detector or an equivalent device properly calibrated to detect hydrocarbon vapors at a detection limit of at least 1 part per million (ppm) to test for potentially harmful petroleum hydrocarbon vapors.

(2) In the event the owner or operator discovers potentially explosive levels of petroleum hydrocarbon vapors or potentially harmful petroleum hydrocarbon vapors in any structure in the vicinity of the release site, a vapor venting system capable of reducing petroleum hydrocarbon vapors to safe levels within the shortest reasonable time shall be installed and put into operation within 7 days. If the evacuation of any structure is necessary as

a result of unsafe levels of petroleum hydrocarbon vapors, the owner and operator shall be responsible for reasonable costs associated with the evacuation.

(3) Once a vapor venting system has been installed, the owner and operator shall monitor the levels of potentially explosive or potentially harmful vapors, or both as indicated, in the affected structures weekly for the first month and thereafter monthly. This monitoring shall be performed in accordance with subsection 1203B(1)(a) and (b) above and shall continue until vapor venting is discontinued in accordance with subsection (5) and (6) below.

(4) After the vapor venting system has been in operation for 3 months, the owner and operator shall submit the monitoring results to the division for review. If the vapor venting system is not reducing petroleum hydrocarbon vapors to safe levels, the division may direct the owner and operator to modify the vapor venting system as necessary to reduce petroleum hydrocarbon vapors to safe levels. If a reclamation proposal is submitted, vapor monitoring results must be included in the quarterly reports pursuant to §1216A(7). If a reclamation proposal is not submitted, subsequent monitoring results shall be submitted to the division at 3 month intervals until the vapor venting system is discontinued pursuant to subsections (5) and (6) below.

(5) The owner and operator shall continue to operate the vapor venting system until the following safe levels are attained:

(a) levels of potentially explosive petroleum hydrocarbon vapors are less than 30% LEL; and

(b) levels of potentially harmful petroleum hydrocarbon vapors are below the levels set forth in §1201K; and

(c) these levels have been monitored monthly and continuously maintained for a consecutive period of six months.

(6) When the operation of a venting system is discontinued pursuant to the provisions of subsection (5) above, the owner and operator shall continue to monitor the vapor levels in the structure every two months until one calendar year has passed showing continuous readings at levels at or below those set forth in subsections (5)(a) and (b) above or until corrective action is completed whichever comes first. If the readings rise again above the levels set forth in subsections (5)(a) and (b), the division must be notified and the vapor venting system must be put back into operation in accordance with subsection (2) above.

C. Other Hazards.

The owner and operator shall remove any exposed petroleum prod-

ucts, and mitigate any other immediate fire and safety hazards as soon as possible, but in no case later than 72 hours after the confirmation or other identification of the release.

§1204 72 HOUR AND 7 DAY REPORTING REQUIREMENTS

A. The owner, operator or their representative must make an oral report summarizing the abatement procedures undertaken and the results of the initial investigation to the division within 72 hours of the date of the confirmation or other identification of a release.

B. The owner, operator or their representative must submit a written report to the division within 7 days along with the written notice required under USTR §204. This report must summarize all the work done pursuant to §1203 and shall include:

(1) the information about private and public water supplies which the owner and operator obtained pursuant to §1203A;

(2) well logs and construction and location information for any on-site wells;

(3) information about any known or suspected water supply impacts and any actions taken to abate such impacts;

(4) information, including test results, about vapors detected in the vicinity of the site;

(5) if potentially explosive or harmful levels of vapors were detected, information about actions taken to abate the vapors and any plans for further action;

(6) information about other fire and safety hazards and actions taken to abate such hazards; and

(7) information about the current and past ownership of the UST system, the substance stored in the system and the property on which the UST system is located.

§1205 ON-SITE INVESTIGATION

A. The owner and operator must conduct an on-site investigation of the release site within 30 days unless the owner and operator can demonstrate that ground water has not been contaminated and that one of the following conditions exist:

(1) the release is cleaned up to the standards set out in these regulations within 72 hours; or

(2) the release is permanently contained and it can be demonstrated that the release has not moved beyond the excavation area.

B. The purpose of the on-site investigation is to determine whether ground or surface water has been impacted or whether impact is threatened,

whether other hazardous conditions exist as a result of the release and whether immediate mitigation procedures such as free product removal, soil removal or soil venting are necessary
to prevent the contamination from spreading, or to remove or reverse on-going contamination. Division staff are available to discuss site-specific aspects of the on-site investigation, and owners and operators are encouraged to solicit division input before and during the investigation. A report on the on-site investigation must be submitted to the division in accordance with §1206.

C. The on-site investigation must accomplish the following:

(1) a determination of the horizontal and vertical extent of soil contamination performed in the following manner:

(a) soil borings must be advanced in the zone of the release site where soil contamination is most likely to be encountered. A soil vapor survey may aid in locating this zone;

(b) the magnitude of petroleum hydrocarbon contamination in the soil boring must be assessed and recorded at 5 foot intervals using a properly calibrated field instrument,if appropriate, or laboratory analysis. Procedures for field assessment of soil contamination and the collection of samples for laboratory analysis are attached to this Part XII as Appendix C. If a laboratory analysis is used, the results must be available for the 45 day on-site investigation report described in §1206. If any of the soils encountered are highly contaminated soils, as defined in §1201, the procedures set out in §1209 must be followed. As the soil borings are advanced, soil characteristics such as color, grain size, texture, degree of lithification, plasticity and clay content must also be assessed and recorded at 5 foot intervals;

(c) to determine the horizontal extent of soil contamination, at least four additional soil borings must be advanced at appropriate locations until the suspected release site is bounded on four different sides by soil borings which contain a total aromatic hydrocarbon level of less than 100 ppm. If the soil borings indicate that contaminated soils extend beyond the boundary of the property on which the UST system is located, and access to adjacent property cannot be obtained in a timely manner, soil borings must be advanced to locations within 10 feet of the boundary of the property on which the UST is located;

(d) all borings must be advanced to the water table or to a depth 5 feet below the depth at which soil contaminated with a total aromatic hydrocarbon level of 100 ppm or greater was last encountered;

(2) a determination of whether the release has impacted ground water:

(a) at least three ground water monitoring wells must be installed:

(i) at any site where the depth to ground water is less than 25 feet; or

(ii) at any site where the depth to ground water is 25 to 50 feet and 50 gallons or more of petroleum product were lost; or

(iii) at other sites where the presence of free product on the water table is known or suspected or where the results of the soil boring survey indicate that ground water contamination may have occurred; or

(iv) if requested by the division;

(b) one monitoring well must be located on-site in the area of highest contamination, as determined by the soil borings described in subsection (1) above. If possible, at least two of the additional monitoring wells must be located down-gradient from the first well. The purpose of these monitoring wells is to determine the on-site extent and magnitude of dissolved and free-phase contamination in ground water and to determine the probability that contamination has traveled off-site.

(c) all permanent monitoring wells must comply with the requirements of the division's well policy set forth in Appendix D of this Part XII and must have the following elements substantially as illustrated in Appendix E of this Part XII, unless other specifications are approved in advance by the division:

(i) a screen of appropriate length spanning the air-water interface;

(ii) cement grout;

(iii) a bentonite seal; and

(iv) a cap on the bottom of the well and a locking cap at the top;

(d) if temporary monitoring wells are used for the on-site investigation, the screened area must extend across the water table so that free product on the water table will readily enter the well. Temporary wells must remain installed on site for at least two weeks. All monitoring wells must be clearly marked and secured to avoid unauthorized access and tampering, and must be closed or abandoned in accordance with the requirements of the division's well policy (Appendix D);

(e) the owner and operator must check the monitoring wells for the presence of free product using gasoline-finding paste, a clear bailer or other appropriate method. The owner and operator must check again for free product 7 days after the installation of the monitoring well. If free product is present in any well, its apparent thickness must be measured, its

horizontal extent must be defined, and recovery procedures must be initiated in accordance with §1208;

(f) water samples must be gathered from each of the monitoring wells in accordance with §1207B within 48 hours after the well is installed. Appropriate water quality analyses must be performed on the samples by a qualified laboratory;

(3) identification of the location of all underground utilities and other subsurface structures on or adjacent to the site, unless the release has been contained and it is evident that no contact with utilities or other subsurface structures occurred prior to containment. The depths to all utilities as well as the composition and construction of the water lines, sewer lines, telephone cables, electric lines, and natural gas lines within this area should be identified to determine the susceptibility of these utilities to contaminant permeation or deterioration. The owner, operator or their representative must notify the utility owner that the release has occurred and request permission to perform a site check of the utilities or other subsurface structures most likely to be contaminated by the release to determine whether petroleum products or vapors are present. If exposed petroleum products are discovered in any subsurface structure, they must be removed pursuant to §1203C; and

(4) identification of all surface water courses within a 1/2 mile radius of the site. Preliminary determinations of ground water gradients and soil characteristics from the literature or previous investigations in the area can be used to approximate contaminant movement toward these water courses. The movement of exposed or free petroleum product into surface water must be stopped within 24 hours of discovery and further movement must be prevented. Immediate action must be taken to stop the movement of petroleum contaminated ground water into surface water.

§1206 REPORT ON THE ON-SITE INVESTIGATION

A. The owner, operator or their representative must submit a letter or informal written report summarizing the results to date of the on-site investigation to the division within 30 days of the date of the confirmation or other identification of the release. The informal report must include:

(1) information about the contamination or threatened contamination of ground and surface water, including the results of the free product investigation. Copies of the water quality analyses performed pursuant to §1205C(2)(f) should be attached to the report. If the results are not available at the time the report is submitted, they should be forwarded with the 45 day report described in subsection B below or sent, clearly identified, to

the UST Bureau at the division's main office in Santa Fe as soon as they are received, but not later than 35 days after the date the sample was taken;

(2) results of the utility site check, and current results of any vapor monitoring performed pursuant to §1203B; and

(3) records of tightness tests, repairs to the UST system, release detection monitoring results, and other pertinent records for the UST system from which the release occurred or is suspected of occurring, unless the release is known to have resulted from a spill rather than a subsurface discharge;

B. The owner, operator or their representative must submit a written report describing the results of the on-site investigation to the division within 45 days of the date of the confirmation or other identification of the release. The report must include:

(1) information about the extent of soil contamination at the release site, including the raw data from soil borings advanced at the site;

(2) preliminary information about soil and aquifer characteristics in the vicinity of the release;

(3) a description of any actions taken and a brief description of plans for future actions to recover petroleum products released from the UST system;

(4) a report on the removal of highly contaminated soils and free or exposed petroleum products which describes how and where these substances were disposed of or treated;

(5) drawings of the release site, including property boundaries, buildings, monitoring wells, storage tanks and lines, sumps, impoundments, pit areas, utilities, water lines and other relevant structures;

(6) monitoring well data including well construction methods, materials, and soil boring logs; and

(7) a statement signed by the owner or operator or the person preparing the report for the owner or operator stating that he or she is personally familiar with the information submitted in the report and attached documents.

[Section 1207—SPLIT SAMPLES AND SAMPLING PROCEDURES deleted.]

§1208 FREE PRODUCT REMOVAL

A. Where the depth to ground water is less than 25 feet, and there is an accumulated thickness of one inch or more of free product on the water surface in at least one monitoring well, a system capable of recovering floating product must be in place and operating within 30 days.

B. Where the depth to ground water is greater than 25 feet, but less than 50 feet, and there is an accumulated thickness of one inch or greater of free product on the water surface in at least one monitoring well, a system capable of recovering floating product must be in place and operating within 45 days.

C. Where the depth to ground water is greater than 50 feet, and there is an accumulated thickness of one inch or more of free product on the water surface in at least one monitoring well, a system capable of recovering free product must be in place and operating within 60 days.

D. Free product removal must be performed in a manner that minimizes the spread of contamination into previously uncontaminated zones, by using recovery and disposal techniques appropriate to the hydrogeologic conditions at the site.

E. Free product storage and disposal must be performed in accordance with a Flammable and Combustible Liquids Code approved by the state Fire Marshall or other local authority and any other applicable laws or regulations.

§1209 TREATMENT OF HIGHLY CONTAMINATED SOILS

A. Where highly contaminated soils are present, the owner and operator must:

(1) excavate the contaminated soils to the greatest practicable depth within 96 hours of discovery and treat them by spreading them in a single lift no more than 6 inches thick:

(a) in a bermed area where ground water is greater than 100 feet deep; or

(b) in a bermed area on an impervious liner or surface in a level area where the ground water is less than 100 feet deep. All necessary precautions must be taken to prevent runoff or infiltration of contaminants; or

(2) treat, recycle or dispose of the excavated soils using an alternate method approved in advance by the division. Soils stored temporarily on-site must be stored in a bermed area on an impervious liner or surface in a manner that does not contaminate ground water, surface water or other uncontaminated soil.

B. Where highly contaminated soils remain beyond the depth or horizontal extent of practicable excavation, or when the owner or operator choose to treat contaminated soils in place, the owner and operator must design, install and operate an enhanced soil venting system, or other appropriate soil treatment system approved by the division, within 45 days. This system must be capable of reducing soil contamination levels in a timely

manner. Soil venting systems are generally appropriate only for use on releases of volatile contaminants.

C. An initial evaluation of the effectiveness of the soil treatment system must be done within 30 days after the system becomes operational and any necessary modifications completed within 15 days. Monthly monitoring must continue thereafter until soils meet the requirements of subsection D below.

D. Remediation of soil contamination will be considered complete when:

(1) soil contamination has been reduced to a level which will not contaminate ground water through percolation or as the water table rises and falls with seasonal fluctuations, and the soil is not a source of potentially explosive or potentially harmful vapors in utilities, basements or other surface or subsurface structures;

(2) no highly contaminated soils remain in the ground; and

(3) an analysis of what appears to be the most contaminated soil reveals:

(a) the total aromatic hydrocarbon value to be less than 50 ppm and the benzene concentration to be less than 10 ppm when measured using an appropriate laboratory test, or the total aromatic hydrocarbon value to be less than 100 ppm when measured using an appropriate field instrument, in areas where the underlying ground water contains 10,000 milligrams per liter or less total dissolved solids and the contaminated soil is 50 feet or less above the seasonal high static ground water level; and

(b) if the soil was contaminated by diesel fuel, motor oil, heating oil, kerosene, jet aviation fuel or other heavy petroleum product, the total petroleum hydrocarbon value (TPH) is less than 100 ppm using an appropriate laboratory test in areas where the underlying ground water contains 10,000 milligrams per liter or less total dissolved solids and the contaminated soil is 50 feet or less above the seasonal high static ground water level.

E. A report describing the treatment of highly contaminated soil must be submitted to the division pursuant to §1210B(8) as part of the hydrogeologic investigation report. If a hydrogeologic report is not prepared, a separate report describing the soil treatment system design, its initial effectiveness and any treatment system modification must be submitted to the division within 75 days.

[Sections 1210 through 1222 and Appendices B, C, D and E deleted.]

APPENDIX A
CORRECTIVE ACTION TIMELINE

Days	Action
0	Release discovered or confirmed
1	Notification (within 24 hours)
3	Initial abatement (within 72 hours)
30	On-site investigation completed (informal report due)
45	Report on on-site investigation submitted
75	Hydrogeological investigation report submitted
105	Last day division may review hydrogeological report
120	Reclamation proposal submitted
150	Division approval of reclamation proposal
170-175	Modification of proposal if not approved
180-205	Implementation of reclamation proposal begins
270-300	First quarterly report

Supreme Court, U.S.
FILED
MAR 4 1994
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No. 93-1268

In The

Supreme Court of the United States

October Term, 1993

IN RE: L.F. JENNINGS OIL COMPANY,

Debtor,

NEW MEXICO ENVIRONMENT DEPARTMENT,

Petitioner,

v.

ORALIA FRANCO, Successor Trustee for the Estate of L.F. Jennings Oil Company,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Bankruptcy Court can approve abandonment of property of the estate that allegedly violates state environmental laws and regulations designed to protect the public health, where the evidence at trial failed to establish that there was imminent and identifiable harm to the public health and safety.

2. Whether the New Mexico Environment Department's ("NMED") appeal with respect to two (2) of the abandoned properties is moot because this Court cannot provide an effective remedy for NMED should it find in its favor on the merits.

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Respondent, Oralia Franco as the successor chapter 7 trustee for the bankruptcy estate of L.F. Jennings Oil Company, debtor ("Trustee"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's decision in this case. The Tenth Circuit's decision, as amended, is reported at 4 F.3d 887 (10th Cir. 1993).

STATEMENT OF THE CASE

In December 1990, the Trustee inherited a bankruptcy estate consisting in part of three (3) service stations known as Carrizozo, Capitan and Midtown (hereafter the "Properties"), all of which had been closed by the debtor prior to the petition date.[1] The Trustee never operated the debtor's businesses, and never caused or contributed to any contamination, at the Properties. Trustee's Appendix at A-3, A-4.

As required by 11 U.S.C. Section 704(1), the Trustee undertook to sell the Properties, which were subject to liens held by the Federal Deposit Insurance Corporation ("FDIC"). Before the Trustee could sell the Properties, prospective buyers required that he order tank and soil tests to determine whether the soil at the Properties was contaminated. *See* Petitioner's Appendix at 36. Although some fuel remained in the tanks, the tank and line tests showed that the underground storage tanks and lines were tight (i.e., not leaking). Trustee's Appendix at A-4;

[1] *See* Respondent Trustee's Appendix at A-2, which follows this brief ("Trustee's Appendix").

Petitioner's Appendix at 26. The Trustee spent approximately $10,000 of estate funds to test the soil and tanks at the Properties, and later to remove fuel from the tanks. Trustee's Appendix at A-2.

The soil tests showed that petroleum hydrocarbons were present in five (5) samples taken from the Properties in an amount equal to or greater than 100 ppm (parts per million). *See generally,* Petitioner's Appendix at 39. The New Mexico Underground Storage Tank Regulations require notice to petitioner, New Mexico Environment Department ("NMED"), if soil tests uncover hydrocarbons in the soil at amounts equal to or greater than 100 ppm.[2] The Trustee complied with the Regulations by providing telephonic and written notice to NMED of contamination at Midtown and Carrizozo on March 28, 1991, and at Capitan on April 19, 1991. Trustee's Appendix at A-4, A-5.[3] Even though informed by the Trustee of contamination at the Properties, and of the pending bankruptcy, NMED did not file an entry of appearance or request for notice in the bankruptcy case. Trustee's Appendix at A-3; Petitioner's Appendix at 7-8, 10.

Prior to receiving confirmation of the nature and extent of the FDIC's liens, the Trustee entered into a contract to sell Carrizozo. Petitioner's Appendix at 37-38. The FDIC objected to the sale, claiming that the estate did not have any equity in the Properties since the FDIC was

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[2] The Capitan and Carrizozo samples barely exceeded the minimum levels which required notice to NMED. *See generally,* Petitioner's Appendix at 39.

[3] See also NMED's Petition for Writ of Certiorari at 3 (February 1, 1994) ("Petition").

owed approximately $450,000 on promissory notes secured by the Properties. *Id.* at 38. Because of the FDIC's liens against the Properties and the current real estate appraisals, the Trustee concluded that the estate did not have equity in the Properties. *Id.* Thus, as required by 11 U.S.C. Section 554(a), the Trustee filed a motion to abandon the Properties, and on April 9, 1991, served notice of the motion on all creditors as required by the Bankruptcy Code. Trustee's Appendix at A-2, A-3. Objections to the Trustee's motion were due April 27, 1991. *See* Fed. R. Bankr. P. 6007(a), 9006(f).

NMED initially received notice from the Trustee of the potential soil contamination and of the pending bankruptcy in late March 1991, and had an opportunity to timely object to the motion to abandon the Properties. Trustee's Appendix at A-4, A-5, A-7; Petitioner's Appendix at 7-8, 10. NMED failed, however, to take any action in the bankruptcy case with respect to the Properties until August 16, 1991, when it filed its Motion to Reconsider and Quash Abandonment. Petition at 4.

In October 1991, the FDIC filed a motion for relief from the automatic stay pursuant to 11 U.S.C. Section 362(d). Petitioner's Appendix at 40-41. On October 3, 1991, the bankruptcy court entered a Stipulated Order granting the FDIC's motion which found that the estate had no equity in the Properties. Trustee's Appendix at A-3. NMED did not challenge the FDIC's motion, or appeal from the order.

In a letter dated May 21, 1992, NMED confirmed that underground storage tanks at Carrizozo had been removed and that NMED had determined that this site

did not pose an immediate public health or environmental threat. Petitioner's Appendix at 16. By letter dated June 15, 1992, NMED confirmed that all underground storage tanks had been removed from Midtown. *Id.* On May 19, 1992, Carrizozo and Midtown were deeded by the debtor, with NMED's concurrence, to third-party purchasers. Petition at 4.

ARGUMENT

This Court should deny the Petition for Writ of Certiorari for the following reasons: 1) The Petition does not meet the criteria upon which this Court grants certiorari; 2) The Tenth Circuit properly applied this Court's decision in *Midlantic* and found that the abandonment of Capitan was appropriate because it did not pose an imminent or identifiable harm to the public health or safety; 3) The Tenth Circuit properly found that NMED's appeal with respect to the abandonment of Carrizozo and Midtown was moot.

I. THE PETITION DOES NOT MEET THE CRITERIA UPON WHICH THIS COURT GRANTS CERTIORARI.

Rule 14.1 of the Rules of the Supreme Court of the United States, provides in part that a petition for writ of certiorari *shall* contain (emphasis added):

> (j) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 10.

S. Ct. R. 10.1 contains a list of criteria which "while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered" by the Court in granting a petition. The petition filed by NMED is devoid of any of the criteria upon which this Court generally grants certiorari.

The decision of the Tenth Circuit in this case does not conflict with that of another court of appeals on the same matter. Nor does the Tenth Circuit's decision address a federal question in a way which conflicts with a decision of the New Mexico Supreme Court. Moreover, the Tenth Circuit's decision does not depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's jurisdiction. S. Ct. R. 10.1(a). Finally, the decision below does not involve an important question of federal law which has not been, but should be, settled by this Court, or which conflicts with a decision of this Court. S. Ct. R. 10.1(c). To the contrary, the Tenth Circuit did nothing more than correctly apply the law as established in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986).

NMED makes no attempt to explain why its petition should be granted under the criteria established by this Court. Instead, NMED presents a one-sided and misleading argument of the evidence in the record below and then requests that this Court redraft 11 U.S.C. Section 554(a) by advisory opinion to compel chapter 7 bankruptcy trustees to remediate any environmental contamination found in estate property in every case. Such a request is contrary to *Midlantic*, and should be denied.

II. THE TENTH CIRCUIT PROPERLY APPLIED *MIDLANTIC* AND FOUND THAT THE ABANDONMENT OF CAPITAN WAS APPROPRIATE BECAUSE IT DID NOT POSE AN IMMINENT OR IDENTIFIABLE HARM TO THE PUBLIC HEALTH OR SAFETY.

NMED's petition should be denied because the Tenth Circuit's decision was based on undisputed evidence, and is consistent with this Court's ruling in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986). In *Midlantic*, the bankruptcy trustee sought to abandon property which contained 70,000 gallons of toxic, PCB-contaminated oil in deteriorating and leaking containers at a warehouse in Long Island City, New York. 474 U.S. at 497. This Court, faced with the prospect of a man-made health disaster in one of the most populated areas in the Country, concluded that "Congress did not intend for [Section] 554(a) to pre-empt all state and local laws." *Id.* at 506. This Court went on to explain:

> The Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety. Accordingly, without reaching the question whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself, we hold that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.9

Id. at 506-507.

In footnote 9, this Court clarified and limited the impact of its ruling:

> This exception to the abandonment power vested in the trustee by [Section] 554 is a narrow one. It does not encompass a speculative or indeterminate future violatio.. of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from *imminent and identifiable harm.*

Id. at 507 (emphasis added).

The *Midlantic* decision does not prohibit a bankruptcy trustee from abandoning property of the estate which may be contaminated; it only restricts abandonment when it would result in an immediate threat to the public health from an identifiable harm. *Id.* The evidence presented to the bankruptcy court, which was reviewed by both of the appellate courts *de novo*, showed that the Properties did not pose an imminent and identifiable harm to the public health or safety. While the Tenth Circuit only applied *Midlantic* to the Trustee's abandonment of Capitan, both the bankruptcy and district courts found that neither Carrizozo nor Midtown posed an imminent or identifiable harm to the public when abandoned. Petitioner's Appendix at 11-12, 18, 26.

NMED's contention that "The state's expert witness in the bankruptcy court testified to the contrary . . . ," is inaccurate and was contradicted by that witness on cross-examination. Petition at 6. Mr. Bearzi testified that any claimed health threat by NMED was indeterminate and speculative: "The Capitan and Carrizozo sites simply

have not been investigated enough to determine what types of impacts they have. . . . " Trustee's Appendix at A-6. Mr. Bearzi also confirmed that NMED did not have enough data to conclude that there was any danger of explosion at any of the Properties, and also stated that only the "potential" exists at the Properties for any future harm to the public. Trustee's Appendix at A-7, A-8; *see Midlantic*, 474 U.S. at 507 n.9.

NMED's only other witness, Stephen Pullen, testified that NMED had not been able to confirm that the groundwater at Carrizozo or Capitan had been contaminated by fuel leaking from tanks at those sites. Trustee's Appendix at A-9. Mr. Pullen went on to testify that the tests NMED conducted were contradictory of one another, and that it is possible that the contamination found could have been paint thinner and not gasoline or diesel fuel. *Id.*

In light of the statements by NMED's witnesses on cross-examination, and the undisputed fact that NMED subsequently approved Carrizozo and Midtown as free from contamination so they could be sold,[4] NMED's contention that the Properties "constitute serious environmental health and safety threats" is not credible and was appropriately rejected by each of the lower courts. Petition at 7. There was no evidence presented by NMED to the bankruptcy court, and none exists, that the abandonment of the Properties posed any imminent or identifiable harm to the public.

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[4] See generally, Petitioner's Appendix at 16.

In its petition, NMED relies on *Alabama Surface Mining Commission v. N.P. Mining Company, Inc.*, 963 F.2d 1449 (11th Cir. 1992), in support of its argument for "broader environmental protection." Petition at 7. Neither *N.P. Mining Company, Inc.*, nor the cases cited therein, even mention a trustee's abandonment power under 11 U.S.C. Section 554(a). *N.P. Mining Company, Inc.* involved an administrative expense claim for fines assessed by the State of Alabama which related to the debtor's post-petition operation of its mining business. 963 F.2d at 1450. Unlike the instant case, the debtor and the chapter 11 trustee continued to operate the debtor's mining business in violation of state environmental laws after the bankruptcy was filed. *Id.* The only issue before the Eleventh Circuit was "Whether and when postpetition, punitive, non-tax penalties can be accorded administrative-expense status under [11 U.S.C.] Section 503(b)." *Id.* at 1451.

The Eleventh Circuit held that "penalties assessed for postpetition mining activities qualify as an administrative expense under Section 503(b)(1)(A)." *Id.* at 1453. The court based its decision on the federal policy embodied in 28 U.S.C. Section 959(b), which required that the *chapter 11* trustee operate the debtor's post-petition mining business in compliance with state law. *Id.* at 1453, 1458 (emphasis added). The instant case does not involve a Section 503(b) claim for an administrative expense, or a trustee, much less a chapter 11 trustee, who engaged in the post-petition operation of the debtor's business in violation of state law.

Pursuant to 28 U.S.C. Section 959(b), the Trustee was required to comply with New Mexico's Underground Storage Tank Regulations. The Trustee's duty under the

Regulations was to conduct soil and tank tests, and to report any soil contamination found at the Properties in excess of 100 ppm – which he did. Petition at 3; Petitioner's Appendix at 36-37. NMED is asking this Court to interpret Section 959(b) as compelling a chapter 7 bankruptcy trustee to "manage" contaminated estate property. Petition at 7. Section 959(b) does not mandate that a trustee manage and operate estate property in a chapter 7 liquidation bankruptcy case. In fact, such an interpretation is contrary to 11 U.S.C. Section 721, which expressly limits a trustee's ability to operate a debtor's business in a chapter 7 case. As importantly, NMED's argument is unrealistic since it ignores the impact of such a holding on the majority of chapter 7 bankruptcy filings in the United States, which are "no asset" cases.

It is undisputed that the Trustee never "managed or operated" the Properties during the bankruptcy case, and never caused or contributed to any contamination at the Properties. Trustee's Appendix at A-3, A-4. The Trustee, after inheriting closed service stations pursuant to 11 U.S.C. Section 541(a), complied with all State laws by using estate funds to test the Properties for contamination, by reporting the minimal contamination found to NMED as required by the Underground Storage Tank Regulations, and by filing all required reports until the motion to abandon was filed. Trustee's Appendix at A-4, A-5. The Trustee's compliance with New Mexico's Underground Storage Tank Regulations was duly noted by NMED's own expert witness. *Id.* at A-6.

Moreover, this Court in *Midlantic* specifically stated that Section 959(b) does not directly apply to an abandonment under [Section] 554(a) of the Bankruptcy Code –

and therefore does not delimit the precise conditions on an abandonment. 474 U.S. at 505. NMED's argument not only ignores this Court's footnote 9 in *Midlantic*, but also overlooks the fact that the bankruptcy court, in applying *Midlantic*, adopted an approach designed to protect the environment. In its Oral Ruling on NMED's Motion to Quash Abandonment, the bankruptcy court stated:

> I understand the State's position and I don't want you to think that we're going to ignore what I would consider even a reasonably likely environmental degradation, but I don't think that's what you have in this case. . . . The State's biggest complaint in this case seems to be that- . . . the Order of Abandonment was issued one day after the Trustee was supposed to file some other kind of report and I don't think that rises to the level of what the Supreme Court was talking about in the *Midlantic* case where they were talking about an imminent danger to the public.

Petitioner's Appendix at 26.

The bankruptcy court did not need to formulate conditions before approving the abandonment because the Trustee had taken adequate precautionary measures prior to seeking abandonment of the Properties. In addition to spending approximately $10,000 of estate funds to test the soil and tanks at the Properties, the Trustee took action to prevent possible future contamination by having the fuel removed from the tanks pursuant to a court-approved sale of the fuel inventory. Trustee's Appendix at A-2, A-4.

Further evidence that the Trustee had taken adequate precautionary measures, and that the Properties did not pose an imminent and identifiable harm to the public, is found in NMED's actions or inactions. NMED's witness, James Bearzi, testified that, pursuant to the Groundwater Protection Act, NMED prioritizes sites based on health and safety impact to humans, environmental impacts and potential problems. Trustee's Appendix at A-6. As was noted by the appellate courts below, NMED was so unconcerned with the health and safety impact at Capitan that it was not even listed for further investigation. Petitioner's Appendix at 11-12, 18.

III. THE TENTH CIRCUIT PROPERLY FOUND THAT NMED'S APPEAL WITH RESPECT TO THE TRUSTEE'S ABANDONMENT OF CARRIZOZO AND MIDTOWN WAS MOOT BECAUSE THAT COURT COULD NOT PROVIDE AN EFFECTIVE REMEDY FOR NMED IF IT HAD FOUND IN ITS FAVOR ON THE MERITS.

Since the initial appeal was taken, events have transpired which prevent an appellate court from granting effective relief to NMED with respect to Carrizozo and Midtown. In general, "[i]f events transpire during the pendency of the [bankruptcy] appeal which prevent the appellate court from granting effective relief, the appeal will be dismissed as moot." *Matter of T & H Diner, Inc.*, 108 B.R. 448, 452 (D.N.J. 1989). NMED itself has confirmed that the storage tanks have been removed from the ground at Carrizozo and Midtown. Petitioner's Appendix at 16. More importantly, based on NMED's findings that Carrizozo and Midtown did not pose a

serious threat to the public health, Carrizozo and Midtown have been sold with NMED's concurrence to third-party purchasers. Petition at 4; *see also* Petitioner's Appendix at 16.

It is well settled that the duty of an appellate court "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653 (1895); *See also Matter of Sullivan Cent. Plaza, I, Ltd.*, 914 F.2d 731, 735 (5th Cir. 1990) (appeal properly dismissed as moot when appellate court lacks power to provide effective remedy for appellant should it find in its favor on the merits.)

As the Tenth Circuit noted, NMED is seeking an advisory opinion as to Carrizozo and Midtown. Petitioner's Appendix at 10. NMED confirms the point by arguing that "this Court's updated declaration is needed," apparently to resolve pending cases of "[b]ankruptcy courts and federal courts" which are "rife with irreconcilable digressions concerning a trustee's power to abandon. . . . " Petition at 8. Yet, no cases are cited by NMED in support of this broad and confusing statement. It is inappropriate for NMED to seek advisory opinions on other cases which may or may not be pending before lower courts – particularly when the facts of each case are likely to be very different.

NMED also argues that this matter is a dispute "capable of repetition, yet evading review." *Id.* The challenged conduct in this matter is whether a bankruptcy

trustee may abandon property of the estate under the limited exception to the abandonment power found in *Midlantic*. In an asset case where a chapter 7 trustee seeks to abandon property of the estate, he or she may only do so after "notice and a hearing." 11 U.S.C. Section 554(a); *see also* 11 U.S.C. Section 554(c). Before abandonment will be ordered, NMED will have an opportunity, along with other creditors, to object to the abandonment. *See* Fed. R. Bankr. P. 6007(a). Each matter must then be decided on a case by case basis depending on the relevant facts. If the property to be abandoned poses a threat to the public health as found by the bankruptcy court applying the *Midlantic* standard, abandonment will not be allowed. If it does not, abandonment will be permitted.

NMED's arguments that the appeal was not moot were properly rejected by the Tenth Circuit in its decision below. Petitioner's Appendix at 10. As that court noted, NMED will have ample opportunity to oppose abandonment in each case where the issue arises, should it properly enter an appearance and file a request for notice pursuant to the bankruptcy rules. *Id.; see* Fed. R. Bankr. P. 9010(b).

There is no relief that this Court can fashion for NMED at this time. All underground storage tanks at Carrizozo and Midtown have been removed, and those Properties were sold in 1992 with NMED's consent to third-party purchasers.

CONCLUSION

NMED's petition should be denied because under the undisputed evidence presented at trial each of the lower courts properly applied this Court's decision in *Midlantic*, and found that the abandonment of the Properties was proper. In its petition, NMED is trying to create an environmental issue which does not exist under the facts of this case for the purpose of obtaining an "updated policy declaration." *Midlantic*, when read in its entirety, provides a clear and appropriate direction to a bankruptcy court as to when a trustee should be allowed to abandon property of the estate which may be contaminated by petroleum hydrocarbons. These issues should be decided on the facts of each case, and 11 U.S.C. Section 554(a) should not be revised by advisory opinion to compel chapter 7 bankruptcy trustees to remediate any environmental contamination found in estate property in every case.

WHEREFORE, the Trustee respectfully asks that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE:

L. F. JENNINGS OIL COMPANY,
Employer ID# 85-0128945,

Case No. 7-90-04081 ML

Debtor,

MOTION TO RECONSIDER AND QUASH
ORDER OF ABANDONMENT

<TRANSCRIPT EXCERPTS>

BE IT REMEMBERED that the above entitled matter came on for hearing in the United States Bankruptcy Court before the Honorable Mark McFeeley, commencing at 9:00 a.m. on April 27, 1992, in Albuquerque, New Mexico, before Suzan E. Smith, a Notary Public and Court Reporter.

APPEARANCES

GEOFFREY SLOAN
Assistant General Counsel
1190 St. Francis Dr. #N-4050
Santa Fe, NM 87502

JAMES R. JURGENS
Attorney for Trustee
322 Montezuma St. Ste #A
Santa Fe, New Mexico 87501

* * *

THE COURT: L. F. Jennings Oil Company, case 7-90-04081 for final hearing on the New Mexico Environment Department's Motion to Reconsider and Quash the Order of Abandonment.

* * *

HARLEY SWINK

was called as a witness, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

* * *

BY MR. JURGENS:

Q. Were three of the debtor's assets the Carrizozo, Capitan and Midtown Mart One stores?

A. Yes, three of five filling stations that had operated.

* * *

Q. How much of the estate's money did you expend on these properties?

A. I can't tell what utilities payments were made but in the testing, the removal of product and its ultimate sale, the filling of the tanks with water for pressure testing, the removal of that, my memory would be that we spent about $10,000.

* * *

Q. Did the estate file a motion to abandon these three properties?

A. Yes, it did.

Q. Do you recall when that was done?

A. The first part of April would be my memory, 9th, 10th, something like that.

MR. JURGENS: Your Honor, may I ask the Court to take judicial notice that there is a court pleading in the court file dated April 10 of 1991, which reads Notice of the Trustee's Motion . . . to Abandon Property of the Estate.

THE COURT: Any problems, Mr. Sloan.

MR. SLOAN: None.

THE COURT: Okay.

Q. Mr. Swink, was it your understanding that . . . this Notice was served on all creditors [as] required by the bankruptcy [code]?

A. Yes, that's my understanding.

Q. To your knowledge was the New Mexico Environment Department a creditor at that time?

A. No, I don't believe they were.

Q. Had you received any sort of an Entry of Appearance or Request for Notice from anyone at the Environment Department?

A. No, I had not.

* * *

MR. JURGENS: Your Honor, I would ask again that you take judicial notice of an October 3, 1991, Stipulated Stay Order to the FDIC which covers these properties.

MR. SLOAN: No objection.

Q. Mr. Swink, since you took over as Trustee, have you operated either of these three properties at all?

A. No.

Q. Did the estate cause or contribute to any fuel or soil contamination of these properties to your knowledge?

A. No.

* * *

Q. Did the <es>tate have the tanks at Capitan and Carrizozo tested?

A. Yes.

Q. What were the results?

A. They were found to be tight and that includes the tanks and the piping and the lines.

Q. The lines also. Did the estate take any other action to remedy any other possible contamination of the sites?

A. Yes, remove the fuel.

* * *

JAMES BEARZI

was called as a witness, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SLOAN:

Q. Mr. Bearzi, . . . what does Exhibit 1 show?

A. Exhibit 1 is the form that is filled out when a release is first reported. This Exhibit 1 documents the

phone call between Mr. Jurgens and myself on March 28, 1991, reporting a release at the [Midtown] site.

Q. All right, what does Exhibit 2 show?

A. It's a similar document. This reports a release at the Carrizozo site, again a phone conversation between Mr. Jurgens and myself on March 28, 1991.

Q. What does Exhibit 3 show?

A. Similar memorandum of a phone conversation between Mr. Jurgens and myself on April 19, 1991, reporting a release at the Capitan site.

Q. What does Exhibit 4 show?

A. Exhibit 4 is a letter from Mr. Jurgens to myself confirming the telephone conversations that we had had in March on the Carrizozo site and the [Midtown] sites. And it reports the same information that we had talked about by phone as well as some additional information about some sampling results that ILFC had obtained<.>

* * *

Q. Can you say what Exhibit 11 shows?

A. Exhibit 11 is a letter from Mr. Jurgens to myself dated April 19, 1991, confirming the telephone conversation that Mr. Jurgens and myself had had previously regarding the Capitan site where Mr. Jurgens reported the release and gave us some of the minimum information required.

* * *

Q. Finally, what does Exhibit 14 show?

A. Exhibit 14 is a list of all the sites for which we have enough information to rank that are releases from underground storage tanks and have contaminated confirmation of soil and/or groundwater in the State. It's known as the Groundwater Protection Act, corrective action funds, prior<i>ty list and it ranks sites based on health and safety impact to humans as well as on environmental impacts as well as potential problems.

Q. Is the Capitan site listed on that ranking?

A. It is not.

* * *

Q. Mr. Bearzi, in connection with part 12 of the Underground Storage Tank Regulations, can you say whether Jennings Oil Company was in compliance with the requirements on April 10, 1991?

A. Our records indicate that these sites and Jennings Oil was in compliance on that date with part 12 of the Underground Storage Tank Regulations.

* * *

Q. Based on the documents you've testified to here and your educational, professional expertise in geohydrology, . . . do you have an opinion as to the seriousness of the si<t>es at Capitan, Carrizozo and Ruidoso?

A. I do.

Q. What is your opinion?

A. . . . The Capitan and Carrizozo sites simply have not been investigated enough to determine what types of impacts they have. . . .

CROSS-EXAMINATION OF JAMES BEARZI

BY MR. JURGENS:

* * *

Q. . . . <Y>our Exhibit 4 is the letter that I subsequently sent to you confirming the presence of some soil contamination?

A. That is correct.

Q. And when you received this . . . March 29, did you at that point contact Mr. Sloan or anyone else in the legal Department?

A. I did not.

Q. If you had wanted to, Mr. Bearzi, could you have contacted Mr. Sloan or anyone else in the legal Department?

A. I could have.

* * *

Q. Is it your testimony that the Capitan site, for instance, that there's a chance that there's going to be any explosions?

A. The Department does not have enough data because investigation has not been done to make that evaluation.

Q. So, if you don't have enough data, you can't say there's going to be any explosions on Capitan, can you?

A. That is correct.

Q. You can't say that's going to be any explosions or health threat on the Carrizozo site, can you?

A. At this time, correct.

Q. And you really are speculating when you tell us there's going to be an explosion at the [Midtown] property?

A. I guess I could not say with 100 percent certainty that there will be an explosion at the [Midtown] site.

Q. You have also testified that the potential exists for some sort of an explosion or some sort of serious health threat, isn't that true, sir?

A. At which site.

Q. At any of the sites?

A. That is correct. That potential exists.

Q. Again, when we're talking about "potential," you tell me, if I'm understanding you correctly, that means a possible future event that may occur or may not occur; is that correct?

A. That is correct.

* * *

STEVE PULLEN

* * *

was called as a witness and having been first duly sworn, testified as follows:

CROSS-EXAMINATION

BY MR. JURGENS:

* * *

Q. Is it safe to say that your report does not show that there's any groundwater contamination on the Capitan site?

A. Yes.

* * *

Q. Did you confirm, through either of your tests, sir, that there was any groundwater contamination at the Carrizozo property?

A. No, I did not confirm that.

* * *

Q. Is it possible that some of the contamination that you found could have been the result of paint thinner and not from gasoline and diesel fuel?

A. Yes, sir.